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ABSTRACT

Legal issues in teacher preparation and certification are discussed from three perspectives of relevance to educators. First, the legal responsibilities of preservice and inservice teachers in relation to pupils and other participants in the school setting are scrutinized and the controversies surrounding collective negotiations, corporal punishment, and educational malpractice are addressed. Second, the ambiguities inherent in balancing state interests against individual interests are explored, and the problems engendered in attempting to establish and enforce standards for teacher education programs and personnel are considered. Third, the legal merits of theoretical challenges that might force the reform of existing teacher education practices are evaluated, and it is suggested that the courts will proceed cautiously in dealing with unprecedented cases and, that even where reformist litigation may be successful, difficult problems of remedy will remain. The three discussions summarize the status of teacher certification today and offer a base of information from which educational personnel can expand their knowledge of legal issues in their profession. (MM)

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# Legal Issues in Teacher Preparation and Certification

William R. Hazard

Lawrence D. Freeman

Stephen Eisdorfer

Paul Tractenberg

ERIC Clearinghouse on Teacher Education
Suite 616, One Dupont Circle, N.W.
Washington, D.C. 20036

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# FOREWORD

Whether being certified differentiates "competent" education personnel from others is a subject of considerable interest and debate. Institutions of higher education responsible for the initial preparation and much of the continuing education of teachers are finding themselves under increasing judicial scrutiny, as are state agencies charged with establishing and administering teacher certification regulations. Evidence indicates that tomorrow's courtroom will be even more frequently the battleground for adjudicating intricate questions in the licensure of teachers.

The overwhelming complexity and evolutionary character of current law concerning teacher preparation and certification make its study difficult, though challenging. School personnel urgently need expert guidance through the thickets of legal opinions, statutes, and regulations, in order to clarify policy issues in formulating criteria and measures of quality that will assure teacher education programs capable of withstanding the tests of the courts.

The authors of Legal Issues in Teacher Preparation and Certification tackle these thorny matters from three perspectives of relevance to educators. Dr. William R. Hazard scrutinizes the legal responsibilities of preservice and inservice teachers toward pupils and other participants in the school setting; he also addresses himself to the lively controversies surrounding collective negotiations, corporal punishment, and educational malpractice. Dr. Lawrence D. Freeman devotes his paper to an exploration of the ambiguities inherent in balancing state interests against individual interests, and considers the problems engendered in attempting to establish and enforce standards for teacher education programs and personnel. Dr. Stephen Eisdorfer and Dr. Paul Tractenberg together evaluate the legal merits of theoretical challenges which might force the reform of existing teacher education practices. They suggest that the courts will proceed cautiously in navigating uncharted courses of law, and that even where reformist litigation may be successful, difficult problems of remedy will remain.

Clearly, this publication summarizes the status of teacher certification today, and marks some possible avenues for change; it in no way purports to give the final word on a constantly evolving subject. It does, however, offer a solid information base from which education personnel can continue to expand their knowledge of legal issues in their profession.

The Clearinghouse expresses its gratitude to all four authors for their careful analyses and thought-provoking presentations. Appreciation is also expressed to Dr. Victor Rosenblum and Dr. David Imig for their contributions in reading these papers in draft form. We hope that readers find this publication interesting and useful, and we encourage comment, either on the document itself or on the subject it treats.

Karl Massanari
Director, ERIC Clearinghouse
on Teacher Education

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# THE LAW AND TEACHERS: LEGAL ISSUES FOR PREPARATION OF SCHOOL PERSONNEL

William R. Hazard

## PREFACE

Over the past several decades, the courts and the legislatures have devoted increased attention to schools and schooling. Legal and legislative intervention in the structures, content, and operations of public elementary and secondary schools has expanded into a broad range of schooling issues; what once may have been professional decisions now tend to be judicial decisions. The traditional judicial reluctance to move into the substance and processes of school operations has evolved into a more aggressive posture reflecting the courts' concern for basic constitutional rights of teachers and pupils. This essay examines selected areas of law and the implications for the preparation of teachers and the practice of teaching.

The material examined here obviously is selective and does not purport to cover the subject of educational law in any exhaustive sense. Programs for professional education personnel--teachers, administrators, and specialists--rarely include adequate preparation in the fundamental concepts of law and legislation. Beginning professionals are grounded in subject matter and pedagogy but move into their complex instructional and supervisory roles essentially uninformed about their legal rights, duties, and responsibilities. This essay seeks to inform preservice and inservice teachers of their basic legal responsibilities toward pupils and other participants in the school setting. The review and examination of statutes and case law attempts to serve the interests of student teachers, interns, supervisors, and the younger professionals just entering the profession.

The selection of case materials, statutes, and legal issues and their interpretations are the author's responsibility and any shortcomings or omissions must be charged accordingly.

The generous assistance of a number of colleagues is gratefully acknowledged. Andrea Crane helped in researching the material. Joan LeBuhn, Mary Gutekanst, and Nancy Dornbos provided their usual able, patient assistance in the preparation of the manuscript. A special note of appreciation is due Victor Rosenblum, a member of the law faculty and a professor of political science at Northwestern University, for his review and criticism of the manuscript. His comments and suggestions were most helpful in the preparation of the final draft of this paper.

William R. Hazard
Northwestern University
Evanston, Illinois

## INTRODUCTION

The law has taken a central role in policy making for public schools. Through state and federal court decisions, legislation, and agency rules and regulations, the judicial branches of federal and state governments have made significant interventions in the machinery and procedures of public education. The application of constitutional provisions to school issues has created a new ballpark for board, administrator, and teacher relations with pupils, with parents, and with each other. The court's traditional reluctance to intervene in school conflicts has given way to aggressive intervention as school problems are framed in constitutional terms. Teacher employment matters now tend to be framed in terms of collective bargaining, negotiated contract provisions, state tenure legislation, and due process language of the state and federal constitutions. Pupil discipline no longer is a simple matter of community mores translated into local district policies; searching a student's person or property for schoolhouse "contraband," infliction of corporal punishment, and the suspension and expulsion of unruly pupils now raise substantial questions of privacy rights, protection against cruel and unusual punishment, and the constitutional protections of substantive and procedural due process of law. Making and keeping records of academic performance and personal behavior of pupils, long regarded as a fundamental duty of the schools in their concern for the "whole child" and their role as societal bookkeepers, is now constrained by state and federal laws.[1]

The impact of the law is felt at all levels of school operations and by every professional (and nonprofessional) in the public school enterprise. Board members, administrators, supervisors, teachers, student teachers, and other preservice professionals of all kinds work daily in a setting bound by the constraints and duties imposed by court rulings, statutory mandates, and agency prescriptions. Nearly 45 million pupils and over 2.5 million teachers, administrators, and other school professionals meet daily in an atmosphere charged with a growing awareness of legal rights, duties, and remedies in the 60,000+ public schools in the United States.[2] The ancient admonition that "ignorance of the law excuses no man" has a special meaning to educational personnel these days as more and more schoolhouse matters evolve into lawsuits and the complex human interactions in the schooling process get entangled in the even more complex network of state and federal rules, regulations, and guidelines. Few preservice teacher preparation programs offer even minimal work in education law, and most practicing teachers and administrators are left to their own devices in dealing with the manifold legal issues of schooling. To assume that well-intended, professional-minded school personnel will somehow weave a sound course through legal thickets can be expensive folly. Their awareness of the legal implications of their work is important both to their professional role and to the pupils and parents they serve.

This essay is not an exhaustive compilation of laws, legislation, and legal guidelines relevant to preservice and inservice teachers. It attempts to identify and examine some of the important legal concerns in public schooling and provide the teachers with useful insights and understandings of the law as it intervenes in the school processes. Through an examination of selected recent court decisions, the current state of judicial thinking on key school law issues will be presented and, whenever appropriate, related to the policies and practices commonly found in school systems across the country. The cases will be examined from the perspectives of both the producers and

consumers of schooling. Recent cases on student rights give some useful insight into the rights of pupils but seldom shed light on the educational options left to the schools or the policy implications for school managers.

An examination of representative statutory material attempts to illustrate the major concerns of the law in the preparation of teachers and educational specialists. Except for a few references to the role and status of precertificated school professionals in the clinical setting, most school statutes concerning such matters as pupils, tort liability, and discipline procedures apply to preservice and practicing teachers alike. Preservice professionals need to be informed of their legal rights, duties, and liabilities as practicing professionals. As this author noted in an earlier ERIC publication: "Aside from a few relatively minor laws dealing specifically with student teachers, the significant legal problems germane to student teaching are (those) affecting the profession at large."3

## THE LEGAL STRUCTURE OF PUBLIC EDUCATION

Schools are creatures of law and are subject to the law. The legal responsibility for public education lies with state government and, by operation of the Tenth Amendment of the U.S. Constitution, the states have near-complete responsibility for and control of their public school system. The Constitution, though silent as to public education, has been interpreted to authorize the use of federal funds for specific, congressionally mandated educational purposes (such as teacher training, compensatory education programs, bilingual programs, and facility improvement), but the support of general educational expenditures is a state responsibility.* With federal funding for the specific, categorical programs comes more or less federal control through agency regulations or "strings" on the funds.

Under most state constitutions, the state legislature is mandated or authorized to provide public education for its citizens on whatever terms and to whatever extent the legislature chooses. The legislature, in providing for public education, must respect the rights and protections granted to citizens under the federal Constitution. Thus, each state may choose the kind, form, and scope of its public school system, but whatever education is offered must be consistent with the constitutionally protected rights of any citizen. The state system cannot discriminate on the basis of race, sex, religion, or political beliefs; the state can classify students (discriminate) on the basis of age, mental ability, grade level, distance of residence from the school, and other factors so long as the classification scheme does not violate a protected constitutional interest of the child or the parents.

In implementing the mandate to provide public education, the state government can organize the schools in a variety of systems. The state may create a single school district (Hawaii) or several school districts. The extent of local decision making (or local control) for schools is a political rather than a legal decision. Under the arrangement in most states, local school districts are managed by elected or appointed school boards (or a comparable governing body) with broad management powers and duties. These powers typically include

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* The historic roles of the federal and state governments in funding education are under substantial revision. Bloc grants, revenue sharing, and funding consolidation of federal funds reflect significant evolution in the theory and practice of federal participation in educational funding.

teacher employment, supervision and dismissal, curriculum design (consistent with any state-mandated subjects or specific courses), pupil management policies, the school calendar, the scope and nature of the extracurricular program, the social activities, and so forth. In short, the local school board generally decides what kind of schooling is offered in the local district. The state usually provides machinery to monitor, supervise, and sanction local schooling through state or intermediate (county or regional) level agencies. The influence of these regulatory or supervisory agencies usually turns on their capacity to stop state funds for local noncompliance. The local governing body, particularly if elected, must account politically, if not educationally, to the voters. This means that the district voters can exert their political power at school board elections, bond referenda, tax rate increases, and, in a few states, by recall of elected school officials. Professional employees of the local school enjoy some degree of insulation from direct polit ical action but, realistically, are subject to informal political pressure from dissatisfied parents.

State and federal law reaches into the local schools in a variety of ways. School funds are public funds and, as such, are subject to state or federal legislative intervention. State law determines the credentialing or licensing of teachers for public schools. The local board can decide who will be employed, but the state decides who shall be in the "pool" of qualified applicants. The parties to the schooling transaction--pupils, teachers, parents, and managers--are citizens and enjoy the protections and carry the burdens of citizenship with them into the educational setting. Over the years, our legal and educational institutions blurred the citizenship rights of juveniles and, to a lesser extent, the teachers and viewed the children as entitled to custody rather than liberty[4] and the teachers as employees subject to paternalistic control by school authorities. It took Supreme Court decisions to explain that children do not shed their constitutional rights at the schoolhouse door[5] and that teachers, in addition to being school employees, are also citizens with the right to exercise the incidents of citizenship by voicing public comment about public officials.[6]

The local school districts, under the management of the district governing boards, define and implement the specific details of public schooling. The terms and conditions of employment are determined by the board or, in some districts, by collective bargaining between the organized teachers and the board. Under collective bargaining, the details of the bargained contract vary widely but generally include "wages, hours, and conditions of employment." In addition to these basic economic concerns, an increasing number of negotiated contracts deal with matters of employment policies (for example, grievance machinery, seniority, dismissal priorities), educational policies (class size, discipline, curriculum, school calendar), and such issues as accountability, evaluation, inservice education, and promotions. Decision-making authority in many districts has expanded from the board and administrators to include the organized teachers and, in some districts, organized "middle managers." The management process can produce some interesting conflicts in schools.

A number of school districts have been caught between apparently irreconcilable demands of the law and various constituent groups. For example, the Chicago, Illinois, school board recently was held to be in noncompliance with federal faculty desegregation guidelines and was denied access to certain federal funds for school programs. To place itself in compliance status

would force the board to violate the negotiated contract with the teachers union, which contained specific provisions about seniority and voluntary and involuntary teacher transfers. In other instances there has been strong parent opposition to court and legislative mandates concerning school organization and operations. In such instances, the conflict between political pressures and the force of law places the schools in an untenable position. Schooling can survive only in a pro forma sense when its values, practices, and processes become alien to the political majority (or perhaps more accurately, the influence majority) in the local district. The interdependence of law, politics, economics, and education takes on a sense of reality in many local school districts. The trend of court decisions in school-related cases over the past few decades should teach one hard lesson: when schooling conflicts with the law, schooling will lose the battle.

The traditional notion that schools offered their wares to pupils and parents on a take-it-or-leave-it basis is no longer tenable. The clients of schooling have turned to the law for both a sword and a shield. Decisions by school boards, administrators, and teachers are challenged by pupils and other school clients. As these challenges escalate into lawsuits and legislation, the traditional relationships among the parties change. Parents seem less willing to accept school decisions about their children; pupils are less inclined to accept the school regimen as the gospel. This growing skepticism and articulate challenge to school policies and practices is healthy; our increasing reliance on the law to "cure" educational ailments may not be. Throughout the material examined in this paper, the almost desperate search for clean, crisp legal solutions to ambiguous problems seems evident. The law seeks to balance the individual interests of the pupil or the parent with the corporate societal interests. The schools, as creatures of law, undertake to serve the individual and the societal interests. Whenever the law must choose between these occasionally conflicting interests, the schools face an unhappy dilemma. The educational malpractice cases discussed here may illustrate the problem of the court's undertaking to solve one legal problem and thereby creating another.

Schools, then, operate at the pleasure of the state legislatures and under sanction of state laws and within the purview of federal laws. The organization, management, and operational decisions generally are left to the local school district under the legal control of a local governing body. The roles of the teachers, the pupils, and the parents reflect both local and state educational decisions, with federal influence acting through program funding and the several regulatory agencies interested in school matters. The legal issues in schooling stem generally from the statutory mandates imposed by the state and the constitutional interests protected through court action. Teachers play a sensitive role in schooling and should be well informed about their rights, duties, and liabilities and those of the pupils. The price of ignorance about the law and its implications for schooling is frightfully high. Aside from the economic cost of school lawsuits, the hostility and alienation generated in them interfere with effective schooling. As a seedbed for young minds, the schools surely should be one social institution in which law, fairness, and equity prevail.

## STATUTORY PROVISIONS FOR PRESERVICE PERSONNEL

Aside from establishing machinery to "certificate" or license teachers,[7] state legislatures deal with the legal status, rights, duties, or responsibilities of preservice educational personnel only in a general sense. In most states, the circumstances and relationships in student teaching and professional preparation experience are not the subject of statutory law; most of the detailed prescriptions and program elements are defined by the teacher training institutions under the general oversight of the chief state school office. Statutes provide extensive guidance for practicing teachers in their professional roles and responsibilities. The law concerning student teachers, interns, and other precertificated educational personnel is in a developmental state, and there is yet to develop in most states a clear, definitive picture of their legal rights, duties, and relationships. A few states extend liability insurance coverage to student teachers, and a limited number vest the student teacher with role responsibilities and authorities (for example, West Virginia grants student teachers the "authority of a substitute teacher"; Tennessee charges student teachers to "comply with all rules and regulations of [the local board] and observe all duties of teachers [as provided by state statutes]"). Kentucky grants student teachers the same legal status and protections of law as certificated personnel. Connecticut may win the award for realism: it includes student teachers in the mandated school board indemnification plan for injuries suffered at the hands of assaulting pupils.

The statutes of 26 states, cited and abstracted here, illustrate the nature and extent of legislative attention to preservice personnel. The selected statutes deal with (a) student access to professional education programs, (b) the protections of law extended to student teachers and interns, (c) registration or certification of student teachers, (d) agreements between public schools and institutions of higher education concerning student teaching, and (e) the duties and legal status of student teachers. Statutes concerning the legal status of preservice personnel are of recent origin; few predate 1965, and most provisions concerning student teachers have been enacted since 1970. This fact should not be surprising inasmuch as it reflects the ambiguous professional role assigned to preservice educational personnel. The culture of teacher education traditionally regarded student teachers as organizational burdens to be watched carefully lest they harm the pupils on whom they practiced their pedagogy. Until the past decade, preservice teachers rarely were allowed to talk and work with pupils until after a long (and too often a tedious) period of "dry runs" through the wonderland of methods courses and classroom "observations." Student teachers usually were regarded as burdens to be ransomed to a school for a modest fee to the supervising or "critic teacher" who, after appropriate dry runs and drier pedagogical warmups, placed the young teacher before a class of live pupils. Those who survived the shock were duly presented for certification as new teachers. One must wonder why, under this scheme, bright, energetic, eager young teachers were professionally worthless (were, in fact, of negative worth inasmuch as colleges paid schools to accept them for student teaching) one day, and the next day, having received their B.S. or B.A. degree and teacher certification, were sought after by school districts waving $8,000 contracts at the new teachers.

In any event, preservice educational personnel have received only casual legislative regard, reflecting in my judgment the unresolved ambiguities in the professional rites of passage.

The statutory citations must be regarded with caution. Statutes change and new legal relationships are established by legislation, case law, and agency rulings. The interested reader is advised to check carefully the current statutes, case law, and appropriate agency regulations to divine the state of the law concerning preservice personnel in a particular state.

## STATUTORY PROVISIONS

California: Annotated California Code, Education Code, Sec. 13160 and 13160.1.

Sec. 13160 outlines access to and prerequisites for admission into student teaching in California institutions of higher education; authorizes the issuance of a "document . . . authorizing student teaching."

Sec. 13160.1 authorizes the establishment of student internship programs as joint projects by school districts and teacher preparation institutions.

Connecticut: Connecticut Revised Statutes, Chapter 166, Secs. 10-235 and 10-236a.

Sec. 10-235 provides for indemnification of teachers, student teachers, and others in damage suits.

Sec. 10-236a mandates that boards of education shall "protect and save harmless" teachers, student teachers, and others from financial loss from medical expenses arising from injuries sustained as a result of assault (in the course of their duties).

Florida: Florida Statutes Annotated, 1975, Vol. 11, Sec. 228.041.

Defines student teachers as "instructional personnel" and, except for the right to bargain collectively, extends to student teachers the protection of laws accorded certificated teachers.

Idaho: Idaho Code, 1975, Vol. 6A, Sec. 33-1201.

Exempts student teachers from certification requirements of teachers but provides for registration and approval of out-of-state student teachers; extends to student teachers the same liability insurance as provided for certificated teachers and mandates that student teachers shall comply with all rules and regulations of the host institution.

Illinois: Illinois Revised Statutes, Chap. 122.

Sec. 10-20.20 indemnifies teachers, student teachers, and others from damage claims arising from civil rights, death, bodily injury, and property damage suits stemming from employment in the schools.

Sec. 10-20.3 mandates school boards to provide liability insurance to cover the risks defined in Sec. 10-20.20. Student teachers are expressly included in the insured group.

Sec. 10-22.34 exempts student teachers, working under an approved teaching plan, from "constant supervision" by a supervising teacher in the school.

Sec. 10-22.37 authorizes student teaching agreements between school boards and teacher training institutions.

Sec. 21-21, dealing with state "recognition" standards of teacher training institutions, prohibits the assignment or placement of student teachers in such manner as will promote segregation on the basis of race, creed, color, religion, or national origin.

Indiana: Burns' Indiana Statutes Annotated, Sec. 20-5-10-1 and 2.
Sec. 20-5-10-1 authorizes public schools to enter student teaching agreements with institutions of higher education.
Sec. 20-5-10-2 specifies that each such agreement shall set out the rights and responsibilities of the parties.

Iowa: Iowa Code Annotated, Vol. 12, Sec. 260.27.
Provides for student teaching contracts between teacher training institutions and public and nonpublic schools. Student teachers are entitled to protections extended by law to teachers.

Kansas: Kansas Statutes Annotated, Sec. 72-1392.
Permits boards of education to enter into student teaching contracts; provides for the issuance of student teaching certificates; authorizes certificated student teachers to assume limited responsibilities in schools.

Kentucky: Kentucky Revised Statutes, Vol. 7, Sec. 161.042.
Provides for the state board to regulate the use of schools for student teaching; permits cooperative agreements for student teaching; extends to student teachers the same legal status and protections of certificated teachers; and permits preservice personnel, other than student teachers, to engage in supplemental activities with children under supervision.

Maryland: Annotated Code of Maryland, Vol. 7A, Sec. 112B and 116B.
Sec. 112B provides for student teaching agreements; designates student teachers and interns as agents of the school governing boards for the limited purpose of (a) coverage under liability insurance, and (b) workmen's compensation coverage.
Sec. 116B repeats the authorization for schools to enter cooperative student teaching agreements; establishes the method of selection for the supervising teachers; extends to student teachers the same authority as certificated teachers.

Massachusetts: Annotated Laws of Massachusetts, Chap. 41, Sec. 100c.
Provides indemnification against damages arising from suits against teachers, student teachers, and volunteer workers in the school.

Mississippi: Mississippi Code, 1975 Supplement, Secs. 37-132-1, 3, and 5.
Sec. 37-132-1 defines "student teacher" and "intern."
Sec. 37-132-3 charges the supervising teacher to assign to the student teacher or intern "responsibilities and duties that will provide adequate preparation for teaching."
Sec. 37-132-5 extends to the student teacher or intern the protection of laws accorded to certificated teachers, principals, or other administrators

and provides that student teachers and interns shall comply with rules and regulations of the local board and observe all duties assigned to certificated teachers.

Montana: Revised Code of Montana, Vol. 4, Sec. 75-6001.
Exempts student teachers from teacher certification requirements; extends to student teachers the protections of law accorded a certificated teacher; and mandates student teachers' compliance with the boards' rules and regulations and the observance of teachers' duties.

Nebraska: Revised Statutes of Nebraska, Vol. V, Secs. 79-1297 through 79-12100.
Sec. 79-1297 defines "student teacher" and "intern" and their duties.
Sec. 79-1298 extends to the student teacher or intern the protection of laws accorded to certificated teachers, principals, or other administrators and mandates the student teacher or intern to comply with local board rules and observe all duties assigned to certificated teachers.
Sec. 79-1299 charges the cooperating teacher to assign to the student teacher or intern responsibilities and duties "that will provide adequate preparation for teaching."
Sec. 79-12100 defines "board of education" and, in the event the student teacher or intern is in a school without a board, provides an alternative authority person or body.

Nevada: Nevada Revised Statutes, Vol. 14, Chapter 220, Secs. 391.095, 41.038, and 41.039.
Sec. 391.095 authorizes student teaching agreements; authorizes student teachers, counselors, or library trainees to instruct and supervise children in school, on school grounds, or on field trips; and extends to such preservice personnel the liability insurance provided under Sec. 41.038 and sets out provisions for their filing claims against the school (Sec. 41.039).

New York: McKinney's Consolidated Laws of New York, Book 16, Sec. 3023.
Provides that boards shall "save harmless" teachers, practice or cadet teachers, and others from liability arising from suits against them for damages growing out of their work.

North Carolina: General Statutes of North Carolina, Vol. 3A, Article 18B.
Defines the duties of student teachers, extends legal protection of certificated teachers to student teachers, and holds the supervising teacher responsible to assign to the student teacher responsibilities and duties "that will provide adequate preparation for teaching."

North Dakota: North Dakota Century Code, Vol. 3, Sec. 15-47-42.
Extends to student teachers the same legal authority and status as certificated teachers and qualifies the student teacher for coverage by the school's liability insurance.

Ohio: Baldwin's Ohio Revised Code, Vol. 4, Sec. 3345.20.
Authorizes institutions of higher learning to procure liability insurance to protect supervisors and student teachers against claims for damages in the course of their work in schools.

Oklahoma: Oklahoma Statutes Annotated, Title 70, Sec. 1-116(5).
Defines "student teachers" and extends to them the same protections of law accorded the certificated teacher.

Oregon: Oregon Revised Statutes, Chapter 342, Sec. 342.980.
Authorizes student teachers to teach and stipulates that such assignment "has the same effect as if the student teacher were the holder of a valid teaching certificate."

Pennsylvania: Purdon's Pennsylvania Statutes Annotated, Title 24, Sec. 20-2006.
Requires each college to provide such practice teaching as will provide student teachers "a practical knowledge of the art of teaching"; authorizes student teaching agreements; authorizes transportation of student teachers to and from assignments.

Tennessee: Tennessee Annotated Code, Vol. 9, Sec. 49-1301.
Exempts student teachers from teacher certification requirements; extends to student teachers the same protection of laws accorded to certificated teachers; requires student teachers to comply with board rules and observe all duties of teachers.

Utah: Utah Code Annotated, Vol. 53, Chapter 2, Sec. 53-2-15.
Authorizes the state board of education to issue certificates for student teaching; requires such a certificate for all student teachers; and deems student teachers to be certificated employees and covered by liability insurance.

Washington: Revised Code of Washington, Annotated, Chapter 28B10.600.
Authorizes the use of district schools for student teaching.

West Virginia: West Virginia Code, Art. 2, Sec. 18-2-6.
Authorizes student teaching agreements; conveys to student teachers the authority of substitute teachers; and provides for the creation of teacher centers for preservice and inservice teachers.

ANALYSIS AND COMMENT

Although the statutes examined range broadly in scope and detail, a substantial number of common provisions are evident. Provisions for student teaching contracts between school districts and teacher preparation institutions are included in practically all states with student teacher legislation. The extension of liability insurance to student teachers and interns is commonly included in the state legislation. The language of the statutes ranges from "save harmless" to equating the student teachers with certificated teachers for insurance purposes. Most such statutes limit the insurance protection to liability arising from the student teacher's performance of duties in the "scope of his employment."

Three states (California, Kansas, and Utah) provide for the issuance of a student teaching certificate or a certificate-like document, and three states

(Idaho, Montana, and Tennessee) expressly exempt student teachers from certification requirements required of teachers; the rest of the states are silent on the matter.

As to the role and authority of the student teachers, a common pattern is evident. Practically all states require that student teachers comply with local school board rules and regulations and mandate that the student teachers observe all duties of teachers. By express language or clear implication, student teachers are granted the same legal status as certificated teachers or substitute teachers in at least 14 states--Florida, Kansas, Kentucky, Maryland, Mississippi, Montana, Nebraska, North Carolina, North Dakota, Oklahoma, Oregon, Tennessee, Utah, and West Virginia. In almost all of these states, the statute expressly extends to student teachers the protection of laws accorded to certificated teachers.

A few states expressly mention the scope of student teachers' duties. Nevada, for example, authorizes student teachers, counselors, and library trainees to "instruct and supervise children in the school, on the school grounds, or on authorized field trips." The students are to be considered employees of the school district for insurance purposes while conducting such duties. Nebraska law specifies that student teaching "may include duties granted to a certificated teacher . . . and any other part of the school program. . . ." Illinois expressly exempts student teachers from the "constant supervision" required by law for noncertificated personnel assigned to instructional assistance.

Other than general supervisory roles, the statutes say little about the responsibilities of the local school district, the colleges, or the state education chief office in the preservice preparation of teachers and other personnel. Five states provide notable exceptions. Pennsylvania mandates that each college shall provide practice teaching facilities ". . . so organized and administered that those students of the college who are preparing for the teaching profession shall acquire therein a practical knowledge of the art of teaching under the instruction and supervision of their proper teachers." In authorizing the state board of education to enter into student teaching agreements, the West Virginia statute states the purpose of such agreements is to give ". . . prospective teachers the teaching experience needed to demonstrate competence. . . ." Three states--North Carolina, Nebraska, and Mississippi--use almost identical language to define the duties of the supervising teachers and others in the student teaching process. The North Carolina statute, enacted in 1968, provides that:

> It shall be the responsibility of a supervising teacher, in cooperation with the principal and the representative of the teacher preparation institution, to assign to the student teacher responsibilities and duties that will provide adequate preparation for teaching.

The parallel provisions of the Nebraska (enacted 1973) and Mississippi (enacted 1975) statutes repeat the language of the North Carolina law. These three states come close to articulating accountability criteria for student teaching. By framing the responsibilities of the practitioner supervisory personnel (teachers, administrators, and college representatives) in outcome language ("adequate preparation for teaching") and providing for discretion, judgment, and options in the specific responsibilities and duties assigned to student

TABLE 1

SUMMARY OF STUDENT TEACHER LEGISLATION BY STATE

| STATE | Certificate Permitted | Certificate Required | Certificate Barred | Authorizes Agreements | Teacher Centers | Liability Ins. | Indemnify For Assault | Grants Legal Protection of Teachers | Compliance-Board Rules | Observe Legal Duties of Teachers | Extends Teacher Status to Student Teacher | Defines Cooperating Teacher's Duties | Scope of Student Teacher Duties | Provides Transportation |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| California | X | | | X | | | | | | | | | | |
| Connecticut | | | | | | X | X | | | | | | | |
| Florida | | | | | | | | | | | X | | | |
| Idaho | | | X | | | X | | | X | | | | | |
| Illinois | | | | X | | X | | | | | X | | | |
| Indiana | | | | X | | | | | | | | | | |
| Iowa | | | | X | | X | | | | | | | | |
| Kansas | | X | | X | | | | | | | X | | | |
| Kentucky | | | | X | | | | X | | | X | | | |
| Maryland | | | | X | | | | | | X | X | X | | |
| Massachusetts | | | | | | X | | | | | | | | |
| Mississippi | | | | | | | | X | X | X | | X | X | |
| Montana | | | X | | | | | X | X | X | | | | |
| Nebraska | | | | | | | | X | X | X | | X | X | |
| Nevada | | | | X | | X | | | | | | | X | |
| New York | | | | | | X | | | | | | | | |
| North Carolina | | | | | | | | X | | | | X | X | |
| North Dakota | | | | | | X | | X | | | X | | X | |
| Ohio | | | | | | X | | | | | | | | |
| Oklahoma | | | | | | | | X | | | | | | |
| Oregon | | | | | | | | X | | X | X | | X | |
| Pennsylvania | | | | X | | | | | | | | | | X |
| Tennessee | | | X | | | | | X | X | X | | | | |
| Utah | | X | | | | X | | | | | X | | | |
| Washington | | | | X | | | | | | | | | | |
| West Virginia | | | | X | X | | | | | | X | X | | |

teachers and interns, the stage seems clearly set for professional, and conceivably legal, accountability of the practitioners to the student teacher. If, after successfully completing such a student teaching phase, a student were denied certification or employment for want of competence, a persuasive argument could be made that the supervisory teacher and others failed to perform their mandated statutory duties and that such breach of expressly stated duties was the proximate cause of the student's injury (lack of certificate qualifications or unemployability). Whether the concept of negligence can be expanded to include such breach of duty by practitioners is quite uncertain; the Peter Doe case, to be discussed later, was based on a similar argument and, to date, has not been successful in the California courts.

Analyses of the statutory data reveal 12 distinct topics of legislation in one or more states. Although the language varies somewhat, the following provisions are found in one or more state statutes:

Certification of student teachers: required/specifically barred
Authority for schools and colleges to enter student teaching agreements
Authority to create preservice/inservice teacher centers
Liability insurance coverage
Indemnification for injuries from assault
Legal protections of teachers extended to student teachers
Compliance with board rules and regulations
Observation of teacher duties imposed by law
Grant to student teachers of the legal status of teacher
Definition of responsibilities of cooperating teacher and others
Definition of scope of student teacher duties
Provision for transportation for student teachers

Table 1 summarizes the statutory provisions concerning student teachers and interns in the 26 states with legislation on the subject.

From the statutory data available, the following generalizations concerning preservice personnel are warranted:

1. Student teaching agreements between local school districts and teacher preparation institutions are common to most states with legislation concerning student teachers and other preservice educational personnel. The agreements generally are negotiated between the two central parties (districts and institutions) with some participation of the state board of education (or a state commission) or the chief state school officer in rare instances.

2. Preservice educational personnel tend to be covered by the liability insurance provided by the local district for teachers, and the scope of such coverage usually is limited to liability arising from the scope of the student teacher's "employment" or assigned duties. The extension of such liability insurance implicitly recognizes the real possibility that student teachers stand in approximately the same tort relationship to pupils as do regular teachers.

3. Student teachers usually are granted the same protections of law as are accorded to teachers and, correspondingly, are subject to the same rules and regulations of the school board with the obligation to observe the duties of teachers.

4. Few states expressly equate the legal status of student teachers and certificated teachers. The language concerning legal status varies from Oregon's statement that the student teacher's assignment ". . . has the same effect as if the student teacher (held) a valid teaching certificate" to the North Dakota statute which grants to student teachers ". . . the same legal authority and status as if the student teacher were a certificated employee. . . ." The grant to student teachers of the legal protections, duties, and the obligation to comply with board rules in the same fashion as teachers suggests that the student teachers may be treated as teachers in many legal issues. The indicia of teacher status could subject the student teacher to the same rights, duties, and liabilities as teachers.

5. Qualifications for entry into and criteria for successful completion of student teaching generally are not mentioned in the statutes; the professional responsibilities of the supervising teacher, the school district, and the sponsoring institution of higher education likely will be negotiated in the student teaching agreement. As previously noted, however, a few states indicate legislative concern for legal accountability by the practitioners to the student teacher. Such legislation seems to be consistent with the notion of educational accountability already adopted in at least 27 states,[8] and more vigorous legislative action in this matter seems likely.

6. Given the apparent legislative trend toward treating the student teacher on a par with certificated teachers in a legal sense, it seems reasonable to expect increased interest in student teaching, the rights, liabilities, and duties of student teachers, the supervising teachers, and the sponsoring teacher preparation institutions. The student teaching process likely will become more formal and regulated through negotiated agreements between colleges and school districts. The extension to student teachers of legal rights, duties, and responsibilities seems tantamount to dealing with them as certificated teachers in significant legal issues. The legal concerns, then, of preservice personnel may be identical, in large measure, with those of practicing school professionals.

## DUE PROCESS: ORIGINS AND DEVELOPMENT IN THE SCHOOLS

The concept and implications of due process have taken a central position in the application of law to schooling. Cases concerning pupil suspensions and expulsions and teacher dismissal are the most familiar examples of the due process issues in schooling.

The concept of due process is deeply rooted in the common law. Due process recognizes the fundamental rule that persons shall not be deprived of life, liberty, or property without a fair opportunity to defend the threatened right. This concept, grounded in the common law as a principle of natural and inherent justice even prior to the Magna Carta,[9] was secured in that monumental document and in subsequent state and federal constitutions.[10]

The Fifth and Fourteenth Amendments to the U.S. Constitution secure the right of due process. The relevant language is:

> Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."
>
> Fourteenth Amendment: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The interests in life, liberty, and property are protected against government interference except by due process of law.

This section will examine and discuss:

1. The concept of due process--its nature and meaning
2. Applications and development of the concept in school settings
3. The current status of due process as applied to school issues with particular reference to the Tinker[11] and Goss[12] cases
4. Implications for schools and school personnel.

## DUE PROCESS: NATURE AND MEANING

The term "due process" resists precise definition. The exact meaning of the term and its requirements depend on the facts and circumstances of each particular case. The U.S. Supreme Court, in the case of Hannah v. Larche, observed:

> "Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . whether the Constitution requires that a particular right obtain in a specific proceeding depends on the complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.[13]

Whatever the difficulty in making a precise definition, due process includes at least two fundamental elements: (a) notice of the charge, and (b) an opportunity to defend and be heard in an orderly proceeding adapted to the nature of the case.

Due process embraces two aspects: (a) procedural processes designed to assure that the person has notice and an opportunity to be heard before a competent tribunal; and (b) substantive due process, which embraces the notion that "the punishment or other state action must be reasonably related to the objective sought to be accomplished by that action."[14] Whatever the exact wording of the test under substantive due process, the general standard is that state (or, in this context, school) action cannot be unreasonable, arbitrary, or capricious.[15]

As an example of a violation of a student's right to substantive due process: a school district issued a regulation permitting pupils to be suspended

for their parents' misconduct. In finding the rule violative of substantive due process, the court noted:

> The children do not complain that they were denied the constitutional right to an education, but that they were punished without being personally guilty. Thus a cardinal notion of liberty is involved and substantive due process is applicable. . . . Having established a significant encroachment upon a basic element of due process, the state, in order to justify that encroachment, must satisfy a substantial burden. . . . After an examination of the exigency for the questioned regulation, an inquiry should be made as to the existence of reasonable alternative means for fulfilling that need. . . . Since there are alternative paths to restoring teacher authority and since (the regulation in question) is not justifiably or reasonably necessary, we must hold that the school officials have been unable to demonstrate a compelling governmental interest.[16]

The dissenting opinion challenged the application of the "compelling interest standard" and made the point (obvious to most observers of school operations) that "a school has a compelling interest in maintaining discipline and any rational rule to achieve that end should meet the constitutional test. I doubt very much that any rule of discipline could ever be defended in terms of a compelling interest in the exact rule. There are generally viable alternatives to almost every course of human conduct, however rational that conduct may be."[17]

Recently, some school districts have adopted procedures seeking to hold parents legally responsible for any damages incurred by the school as a result of their child's vandalism. The notion seems to be that, as natural guardians of the child, parents should be in control of the child while at school and, consequently, should bear the expense caused by the child's deliberate misconduct. The issue of substantive due process seems certain to arise as parents challenge such board policies.

For the most part, school issues raise questions of <u>procedural</u> due process. The due process questions raised typically are:

1. Does the school rule or regulation, when applied to pupil X, encroach in some way on the pupil's right to liberty or property?

2. If so, does the encroachment affect a constitutionally protected interest or right?

3. If it does so encroach a protected right, was the pupil granted the appropriate procedural incidents of notice and hearing prior to the school's interference with the protected right or interests?

## DEVELOPMENT AND APPLICATIONS OF THE CONCEPT

The U.S. Supreme Court's recognition of children's constitutional rights is a recent development. Prior to the <u>Brown</u> decision,[18] there was little judicial concern for or recognition of constitutional rights of children. The prevailing view held that schools were special places, designed and operated for the benefit of children and, short of arbitrary, capricious, or malicious

actions by the appointed officials, the courts were reluctant to intervene in school matters.

In the development of the due process concept in educational settings, it was necessary to ascertain if a person's access to schooling embraced any interest or right protected by the Fifth or Fourteenth Amendment's notions of due process. Is education somehow a "property" interest and does the state's interference with one's school attendance (by suspension, expulsion, or other "punishment") interfere with the pupil's liberty interest? Due process protections extend, of course, against school districts and their employees inasmuch as the public schools are an arm or extension of the state government. Since, under the Tenth Amendment and a long line of definitive court decisions, education is a state responsibility, schools fall within the ambit of the due process clause of the Fourteenth Amendment. In the language of the Supreme Court in the Barnette case:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted. These (boards) have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[19]

Although Brown did not deal directly with liberty and property interests of school children, the Supreme Court clearly indicated that the fundamental importance of education as a singularly powerful tool for social justice was moving the schooling processes closer to judicial scrutiny. The Court noted that ". . . education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . Today is is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[20] The Court concluded that the opportunity of an education is a right which, once undertaken by the state, must be made available to all on equal terms. We should note that the application of due process to school children does not depend on whether education is a "fundamental right," a "fundamental interest," or something else. The critical question is whether the school officials must give the pupil due process as a condition of interfering with some specific claimed "right."

The Court has held that education is not a fundamental right.[21] That holding, however, does not determine the due process question. Fundamental rights are those explicitly or implicitly guaranteed by the Constitution. Due process liberties are not restricted to constitutionally guaranteed rights but protect the full range of conduct one is free to pursue. As Justice Stewart once noted: "One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."[22] In other words, constitutional due process protections apply to many personal interests not specifically mentioned in the Constitution.

The liberty interest in education has long been recognized by the Supreme Court. In Meyer v. Nebraska[23], the Court said that liberty includes not merely freedom from bodily restraint, but also the right of an individual to acquire useful knowledge. Two years later, in the 1925 decision, Pierce v. The Society of Sisters[24] reaffirmed this notion by holding that the liberty of parents and guardians to direct the education of their children is protected by due process As we will note later in the Goss opinion, the Supreme Court now has no difficulty in find both a protectable liberty interest and a protectable property interest in a pupil's school attendance.

How, then, has the concept of due process been applied in school settings? Due process issues generally arise from a challenge to rules and regulations which seek to punish, bar, limit, or in some way diminish the pupil's access to or full enjoyment of the educational opportunities extended through the public school apparatus. Frequent "due process" issues emerge from regulations: (a) affecting married or preganant students; (b) limiting or conditioning participation in extracurricular activities; (c) concerning participation in interscholastic athletics; (d) dealing with participation in secret clubs and organizations; (e) in matters of personal dress, grooming, and appearance; and (f) dealing with student expression and beliefs.

To deal rationally with due process concerns in school matters, it is necessary for the courts to determine (a) if the specific individual interest claimed falls within the meaning of "life, liberty, and property" as stated in the Fourteenth Amendment and, if so, (b) what procedures satisfy the due process requirements. If the claimed interest fails to qualify for constitutional protection, no process is due. If the interest, however, falls within the purview of Fourteenth Amendment protection, the court must then seek to balance the protected interest of the individual against the state's (or school's) interest in summary adjudication. In determining the applicability of due process, the court examines the nature of the interest at stake. If the claimed interest is, indeed, a liberty or property interest, then the question of "weight" of the interest is considered in the balancing process. The extent and degree of deprivation of a protected interest generally goes to the question of how much or what kind of process is due.

## CURRENT STATUS OF DUE PROCESS IN THE SCHOOL SETTING

Two recent cases (Tinker) and Goss) with a third as prologue (Gault) may be useful to focus our discussion at this point. In re Gault[25] seems to be a turning point in the Supreme Court's view of the consitutional rights of minor children. In that case, Gerald Gault, a 15-year-old boy, was committed to the Arizona State Industrial School by the Juvenile Court of Gila County, Arizona, after a hearing on a charge of making lewd telephone calls. In dismissing a writ of habeas corpus, the state supreme court rejected the notion that the State, acting in character of parens patriae,* was in a non-adversary relationship with Gault, and reversed the state court for the reason that the proceedings of commitment did not give to Gerald Gault the due process to which he was constitutionally entitled.

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* The state's role as protector of the interests of minor children and other legally disabled persons.

The significance of the Gault case lies in the explicit recognition by the Court that, contrary to prevailing practices, children are persons entitled to constitutional protection against state invasion of their rights of liberty. The State of Arizona advanced the theory that children's custody procedures in juvenile court matters were neither civil nor criminal, thus removing any need to examine due process requirements. In rejecting this argument, the Court noted that the hisotry of the juvenile court has demonstrated that unbridled discretion, not matter how benevolently motivated, is a poor substitute for principle and procedure. In holding for the petitioner (Gault) the Court said:

> Failure to observe the fundamental requirements of due process has resulted in instances . . . of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedies. Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. . . .26

A comment by the late Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, is pointed and instructive:

> In their zeal to care for children, neither juvenile judges nor welfare workers can be permitted to violate the constitution, especially the constitutional provisions as to due process. . . . The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of hearing to the proper parties; and finally, a fair hearing.27

Mr. Justice Stewart, dissenting in Gault, insisted that juvenile proceedings are neither civil nor criminal. In his words, "They are simply not adversary proceedings." He urged that the requirements of due process are different in juvenile proceedings than in other judicial proceedings and argued that all of the appropriate indicia of due process were evident in the commitment proceedings.

The landmark case on the constitutional rights of school children is Tinker v. Des Moines Independent School District (393 U.S. 503 [1969]). Although the case turned on the First Amendment rights to freedom of speech, the case is regarded as a highly significant judicial statement on the constitutional rights of children and the delicate balance of school interests and individual rights. Tinker was an action against the school district, its board of directors, and certain administrative officials and teachers to recover nominal damages and to enjoin the enforcement of a school board regulation prohibiting the wearing of black armbands by students while in school. The U.S. District Court dismissed the complaint, the Court of Appeals (Eighth Circuit) affirmed on an equally divided court, and the U.S. Supreme Court agreed to hear the case.

The Supreme Court found for the plaintiffs and held that, absent any facts which reasonably might support a forecast of substantial disruption of or material interference with school activities or any showing of such disruption or interference, the regulation barring such wearing of armbands was an unconstitutional interference with the students' First Amendment rights of free speech and opinion. The majority opinion found the wearing of armbands to be symbolic

speech, protected against state interference by the First and Fourteenth Amendments, and failed to find any basis for curtailment of that right by school officials. In the opinion, the Court noted that:

> First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Although the majority opinion reaffirms the authority of the State and school officials to prescribe and control conduct in the schools, "consistent with fundamental constitutional safeguards," the language of the opinion provides little guidance to school officials in framing appropriate rules and regulations of conduct within the limits of the safeguards. School officials generally were left uninstructed by the Court as to what criteria might fairly support their decision to intervene to prevent "substantial disruption or material interference" with school activities. The Court did note that the proscribed acts: (a) were silent, passive expression of opinion, (b) created no disorder or disturbance, (c) caused no interference with or disruption of the schools' work, and (d) did not intrude upon others' rights to be secure and to be let alone.

Some guidance to school policy makers may be inferred from the Tinker opinion:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that the exercise of the forbidden right would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.[28]

As to the nature and purposes of schooling, the Court noted:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[29]

Clearly, then, First Amendment rights of school children are not absolute and may, in fact, be limited by time, place, circumstance, and likely or actual consequence. The guidelines for school district interference with pupils' rights of free expression do not emerge clearly from the Tinker opinion. The "substantial disruption of material interference" test provides little guidance for school officials.

Mr. Justice Black, in his dissenting opinion, raised questions of whether the school may be used by teachers and students as a platform for the exercise of free speech and whether the Court will allocate to itself the function of deciding how the pupil's school day will be spent. He further charged the majority opinion with resurrecting the long-discarded doctrine that due process authorizes courts "to hold laws unconstitutional when they believe the legislature has acted unwisely."

Tinker obviously raises fundamental questions of the nature and purpose of public education, the course of policy making and regulations, and the delicate balance between public purposes and private preferences. Moving the determination of what constitutes material and substantial disruption and interference with the school's work from the State to the federal courts renders hollow any future illusions about local control of schooling.

Finally, we turn to a more recent Supreme Court decision on student rights to due process in school matters. In the case of Goss v. Lopez, 419 U.S. 565 (1975), the Supreme Court held that students facing temporary suspensions from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment. The property interest, vested by law, cannot be withdrawn on the grounds of misconduct without observing minimum due process procedures required by the Fourteenth Amendment. The liberty interest, arising out of the potential damage to the student's good name and reputation if the student is suspended, likewise requires the protection of "minimum" due process procedures.

In affirming the U.S. District Court which enjoined the Ohio statute and its implementing regulations as an unconstitutional violation of the plaintiff students' right of due process, the Supreme Court noted that:

1. Protected interests in property normally are not created by the U.S. Constitution but originate and take their dimensions from an independent source, such as state statutes or rules entitling the citizen to certain benefits. Ohio state law was the source of the students' claimed property interest.

2. The students' liberty interest stems from the negative nature of possible consequences--"if sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." Once the right to liberty is found, the length and severity of the deprivation may be a factor in determining the type of hearing and is irrelevant to the question if the Constitution protects the interest.

The Court quoted from an earlier case, Mullane v. Central Hanover Trust Co.[30]:

> . . . many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[31]

The majority opinion emphasized that the student's interest is to avoid unfair or mistaken exclusion from the educational process; the Due Process Clause will not shield him from exclusions properly imposed. The risk of error by disciplinarians is not at all trivial and the court felt that it should be guarded against if it can be done without prohibitive cost or interference with the educational process. Except in those cases where the student's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the education process (when immediate expulsion without a hearing is acceptable), due process requires that a suspension of ten days or less must be preceded by written or oral notice to the student and, if the charges are denied, an explanation of the evidence and an opportunity for the student to present his side of the story.

After reiterating its belief that the required notice and hearing will be a hedge against disciplinarian error, the Court goes on to note that: "He (the disciplinarian) may then determine himself to summon the accuser, permit cross-examination and allow the student to present his own witnesses."[32] It seems altogether likely that the wise disciplinarian will stay any suspension upon the student's denial of the charge and proceed to follow the Court's suggested procedure.

The dissent (four justices) questioned the wisdom of the Court's extending due process requirements into the day-by-day discipline management problems of the school. Further, the majority opinion turned a clearly conditional state right to education into an unqualified right. According to the dissenting opinion, any liberty interest here was based, not on any evidence of present or future harm, but on unsupported speculation. Speaking of the States' interest, Mr. Justice Powell noted:

> The States' interest, broadly put, is in the proper functioning of the public school system for the benefit of all pupils and the public generally. Few rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process. . . . In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appropriate sanctions are not applied or if procedures for their application are so formalized as to invite a challenge to the teacher's authority--an invitation which rebellious or even merely spirited teenagers are likely to accept.[33]

## DUE PROCESS IN SCHOOL SUSPENSIONS AND EXPULSIONS

Developing law in student rights issues poses some challenges to the schooling enterprise in general and school authorities in particular. The recent case of Wood v. Strickland[34] illustrates the impact of emerging legal constraints on school policies and practices. It should be noted early on that a legal answer to a school question does not necessarily promote an educationally sound or socially effective outcome. The Wood case grew out of the expulsion of high school pupils for their alleged violation of school policies and rules concerning the possession and use of intoxicating beverages (specifically, the students "spiked" the punchbowl at a school affair).

The students sued the school board members and several school officials on the theory that flaws in the suspension procedures resulted in violations of their rights to substantive and procedural due process. These violations, according to the students' complaint, gave rise to their cause of action under Sec. 1983 of the Civil Rights Act of 1871.[35] The complaint prayed for compensatory and punitive damages against the defendants, injunctive relief allowing the students to resume attendance, restraint from enforcement of the challenged school regulation, etc. The principal question raised in the suit concerned the nature and extent of immunity from liability surrounding the board members. The school principal and the district superintendent, originally defendant parties, were dropped from the case by directed verdict of the federal district court, a decision which was affirmed by the Court of Appeals for the Eighth Circuit. The Supreme Court, in holding for the students, said:

> Therefore, in the specific context of school discipline, we hold that a board member is not immune from liability for damages under Sec. 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[36]

The students, here, need not prove malice to impose liability on the board; they need only show that the board members knew or reasonably should have known that their official decision violated the pupils' rights. In his dissent, Mr. Justice Powell noted that the majority opinion seemed to place unusually heavy burdens on school board members to know when "clearly established constitutional rights" were in fact clearly established and when the board action violated such rights. He noted:

> The Court (majority opinion) states the standard of required knowledge in two cryptic phrases: 'settled, indisputable law' and 'unquestioned constitutional rights.' Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars--much less the average board member.[37]

Mr. Powell also noted that school board reliance on opinion of counsel was no guarantee that their decision would be protected by immunity under the majority "knew or should have known" test. Finally, Mr. Justice Powell argued for the standard of qualified immunity enunciated by the Court in the Scheuer case[38]:

> It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

The Wood case is significant, of course, for its recognition and confirmation of student rights to the full benefit of constitutional and federal statutory protections. It also is significant for its unintended though thoroughly

predictable effect of constraining decisions about pupil discipline. Certainly, most enlightened educators agree that power abuses by school boards and school officers must be curbed and replaced with fair, equitable discipline procedures and outcomes. Malice by school authorities cannot (and should not) be tolerated. If, however, school officials face potential personal liability for good-faith decisions, later held to be erroneous by a judge or jury with consequent heavy penalties, a new set of problems flow from the court house "solution."

The risk of personal liability on board members for difficult and frequently unpopular pupil discipline decisions can be covered by liability insurance; the risk of injury to board members' personal and professional reputation is hardly insurable. If the consequences of good-faith decisions become intolerable, reputable citizens may remove themselves from school board and other civic service. School officials likely will think twice before seeing, hearing, or acting upon pupil discipline matters which carry the potential for successful legal action by the disciplined pupils or their parents. It is hardly rational to expect vigorous enforcement of school discipline policies if the risk of liability to the enforcers goes beyond a generally-sensed "risk threshold." Timid, cautious, defensively executed discipline is of questionable educational value; and if the legal price of policy implementation exceeds perceived societal or pupil benefit, implementation likely will cease.

A further comment on the facts and circumstances leading to the explusion procedures used in Wood should be noted. The two defendants, encouraged by the teacher in charge of the party at which the "spiked punch" was served (without apparent effect), confessed to her their involvement in the incident after she had told them she would handle the punishment herself. The next day, however, the teacher, believing her job to be in jeopardy over the incident, neatly deserted the girls and encouraged their confessing to the principal. They did and he suspended them for a maximum two-week period, subject to the decision of the board. That same evening, the teacher and the principal reported the incident to the board and recommended leniency. At that point, the superintendent received a call from another teacher reporting that he had heard that the third girl, allegedly involved in the punch spiking, had been a fight that same evening at a basketball game. Thereupon the recommendation of leniency was withdrawn and the board, without further inquiry, voted to suspend the three pupils for the balance of the semester, a period of approximately three months.

It takes little imagination to share the girls' sense of betrayal by the teacher into whose confidence they were encouraged; and the board, with even minimal restraint, could well have delayed the suspension decision until a clearer, more definitive fact setting had been developed. The rush to judgment was particularly hasty in light of the post hoc nature of the report of the incident. Whatever harm, if any, was done, and the integrity of the district policies would have been preserved fully by setting the matter over until even a rudimentary hearing was arranged. The suspension for three months, following on the principal's two-week suspension, smacks of disciplinary overkill and served no discernible educational purpose.

There is no reason to assume that the test of qualified immunity from liability of teachers, principals, or other school officials is substantially different. The parties to any intervention in the schol life of pupils which could be interpreted as violative of the pupils' civil rights face liability for their acts. Turning again briefly to Goss v. Lopez[39], the case grew out of the suspension of the plaintiff students for their alleged misconduct. The suspensions were imposed by the defendant principal under the Ohio law[40] which provided for post-suspension hearing by the board of education. The suspended students challenged

the constitutionality of the Ohio law on the theory that the suspensions without a prior hearing violated the students' right to due process under the Fourteenth Amendment to the federal Constitution.

The Court, in finding for the students, held that, except for those few cases warranting immediate, summary removal of the pupil from the school, in cases of short suspensions of ten days or less the pupil must be given notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. This simple elemental due process--oral or written notice and an opportunity for hearing--may be simultaneous with the school disciplinarian's decision to suspend or not suspend the pupil. The Court explained its reason for requiring such process:

> . . . requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.[41]

The opinion clearly indicates the Court's concern that pupil suspensions be based not on error or mistaken belief by the disciplinarian but on facts, and mandates the rudimentary, informal notice and hearing process to protect the pupil's property interest in school attendance and liberty interest in his reputation. An interesting problem, which in my judgment is connected to the Wood v. Strickland case, emerges.

If the school disciplinarian, upon the pupil's denial of the "charges," decides not to investigate further but chooses to make the suspension decision on the spot, what consequences if the facts later show the child innocent? In other words, if the youngster says, "I didn't do it" and, for whatever reason, the principal does not "summon the accuser" or "permit cross-examination," etc.? The holding in Goss v. Lopez does not require such quasi-judicial procedures and, in a given situation, the circumstances may not appear to the principal to require further investigation. It seems entirely plausible that the disciplinarian's proceeding to suspend in the face of a pupil's denial, later borne out by the facts, amounts to a "knew or should have known" violation of the child's rights under Sec. 1983 of the Civil Rights Act. The pupil, by denying the charges, may well place the disciplinarian "on notice" that a suspension will, in fact, unjustly interfere with the pupil's civil rights (to enjoy the property and liberty interests in attending school with an unsullied reputation) and, if the disciplinarian forges ahead after giving the pupil the Goss-type notice and hearing and nothing more, a Sec. 1983 violation could result. The point is, the casual, almost folksy language of the Goss opinion may obscure the potential consequences for the disciplinarian:

> We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses. . . . Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial type procedures might well overwhelm

> administrative facilities in many places. . . . Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.[42]

Until the Court sheds more light on the issues behind Goss v. Lopez and Wood v. Strickland and provides more guidance to school officials in their day-to-day supervision and management responsibilities, school people are well advised to read the opinions carefully, thoughtfully, and with a sensitive concern for the educational interests of pupils sought to be defined through these cases. Board policies should reflect the fundamental concerns of fairness, equity, and balanced interests of the pupils and the school objectives as discussed in the cases. The conflict between the rights and protected interests of the pupil and the operational procedures of the school may be exaggerated by the pressures for conformity and expediency too often manifested in school discipline policies and procedures. School people, too often, are caught between the competing demands of societal expectations and the constitutional rights of pupils and parents. Teachers, administrators, and others in the schooling enterprise are familiar with the burdens and despair of seeking educational accommodation between such vexatious conflicts in a structural organization not notoriously flexible or responsive to change.[43]

The implications of the Goss and Wood cases for teachers and administrators go beyond the revisions of school discipline policies and procedures. Certainly the due process requirements in Goss can be managed with ease in school suspension procedures. The ambiguities as to what constitutes a "suspension" can be resolved through subsequent cases. As used in the Goss case, suspension seems to mean the complete interruption of the pupil's access to school by causing him to leave the premises. The lesser interruptions of the pupil's scheduled activities are not clearly within the meaning of the term and the Court's holding. Removal from the classroom and assignment to a study hall, detention room, or other setting clearly interrupts the pupil's normal school routine; it is not clear if these interventions amount to "suspensions" within the meaning of the Goss opinion.

The duty of the school officials to give notice of the charges seems clear enough; the nature of the evidence against the pupil is an unclear mandate. Must the school officer, upon the pupil's denial of the charges, identify the informant(s) or merely indicate that information was transmitted to the disciplinarian? The notion of undocumented charges by unidentified witnesses or informants is offensive to our sense of fair play and especially so in a school setting. It seems only right that accused pupils should know the nature of the evidence threatening their school attendance, yet to require the identification of information sources, in some settings, places the good-faith informant in jeopardy of retaliatory action by the accused. The schools have little or no capacity to protect pupil or teacher informants against subsequent retaliation or harassment by the accused or his sympathetic cohorts. It comes down, then, to a dilemma which the school people are ill-prepared to resolve. It seems likely that if the Goss holding requires the identification of informants in the course of giving the pupil an "explanation of the evidence," we can predict a marked decline in teachers' and pupils' ability to see, hear, or otherwise notice any misbehavior by some pupils. If the risk of personal security through retaliation rises above certain (but as yet undefined) levels, only the hardy or the foolhardy will take the risk of informing on misbehaving pupils. The

real possibility of juvenile tyranny in the schools, already reality in many out-of-school situations, must be recognized and dealt with by judicial and school authorities. To the extent that the Goss and Wood decisions promote timid decisions and diminished commitment to rational discipline measures in schools, the pupils are the direct losers.

In addition to the reaffirmation of pupils' civil rights and constitutionally protected interests in schools, the two cases may encourage school authorities to reexamine the efficacy of suspension and expulsion as remedies for pupil misconduct. Few argue seriously that suspending or expelling children from school enhances their education. The schools are challenged by the implications of the two cases to explore alternative ways and means of delivering effective education, except for those children (few in number, one hopes) who simply refuse any form of learning. If the schools regard Goss and Wood as encouragement to their efforts to develop better schooling and less hurtful punishment (than suspension and expulsion), the decisions may lead to useful, positive, educational outcomes.

## IMPLICATIONS FOR SCHOOLS, ADMINISTRATORS, AND TEACHERS

It seems clear that the due process concept, originally linked to judicial proceedings and attached to personal rights of property and liberty, have evolved to embrace most, if not all, significant school decisions. The concept of due process defies specific definition but is elastic both as to application and to required elements. The rights of liberty and property, once found in the educational conflict, secure the protection of the Due Process Clause; the nature, degree, and consequences of the deprivation are factors in determining the minimum required elements of process due.

Under the language in Tinker, the First Amendment rights of free speech and expression by teachers and students can be restrained only if there is evidence that the failure to restrain will result in material interference with or disruption of the school process. The determination of the existence or materiality of interference or disruption is left to the courts and, thus, schools limit pupils' First Amendment rights at their real peril. Perilous decisions are in order when dealing with the constitutional rights and liberties of people; to the extent, however, that discipline decisions, once elevated to constitutional matters, are postponed or timidly pursued, children and society can be serious losers while winning their rights.

At an earlier time, the determination of the nature and purposes of public schooling was clearly a legislative decision, subject to political forces. Such seems no longer to be the case. The nature and purposes of schooling are subject to judicial, not legislative, determination. The inextricable mingling of individual rights and state purposes in school objectives and practices results in subordination of school decisions to judicial interpretations of children's individual rights. Goss clearly ties protectable liberty and property interests to the schooling process and mandates at least three minimum due process elements for suspensions of less than ten days: (a) written or oral notice to the student, (b) a hearing, and (c) if the student denies the charge, an "explanation of the evidence the authorities have" and an opportunity for the student to present his side of the story.

What are the implications of the evolved due process concepts and the case law developments? At this point, we need to use restraint and call upon our best analytical and interpretive judgments.

1. The social and personal value of schooling seems to be ascending along with the operational complexities and challenges of providing quality education. The range of school objectives widens and the consequences of bad schooling or inadequate schooling become increasingly more serious. Whether or not the schools can adequately serve an increasingly diverse clientele through increasingly ambitious comprehensive programs is an open question; in fact, schools as we know them may not survive at all.

   Parental, societal, and organizational mandates for approximate uniformity in schooling are painfully contradictory to the individual rights so recently forced into schooling on the wings of Tinker, Goss, and other decisions.

2. Schools and school officials must modify expectations and alter policies and procedures to accommodate the due process requirements and other constitutional rights of pupils and employees generally. Any intrusion into the child's schooling process should carry with it appropriate procedures to satisfy due process requirements.

   Our decisions and structures to meet educational needs and individual differences must be supported by sound educational evidence and appropriate recognition of the pupil's "protected interests" (grading, academic placement, remedial activities, academic recognition, performance and achievement records, etc.). Significant interruption of the child's access to and full enjoyment of the school's opportunities would wisely include procedures and processes to recognize due process rights.

3. The adversarial relationship between school officials and pupils (and parents) is reinforced by the escalation of schoolhouse rights to constitutional levels. The consequences of this relationship are not clear. It appears unlikely that teachers and administrators will increase their effectiveness as teachers through adversarial relationships with pupils or parents. We are still probing the outer limits of individual rights in the school; as the rights expand or become more clearly understood, it seems imperative that school goals and objectives be modified accordingly.

   To the extent that social mandates on the school are consistent with the school's capacity or ability to respond, schools can "work"; otherwise, we build in school failure as a social enterprise. For example, I'm intrigued by the Court's assumption that school can function both as an instrument of local, state, and national social and political policy and as an implementer of judicial policies--some of which may be anathema to the school's fiscal decision makers. At a more specific level drawn from the Goss opinion, if the school disciplinarian must "explain the evidence" to the pupil, can the school protect the informant against retaliation? Are we equipped to operate a parallel police force in the school discipline machinery; and, if so, does anyone claim that such trappings, however needful, enhance the school's purpose or performance?

4. Somewhat pragmatically, the mandates for due process in school operations call for tempering our educational policies with careful analyses by our school counsel. It is foolish to believe that our educational

motives, however pure, are ample defense to constitutional challenges. Schools are creatures of law and obviously should reflect the most careful concern toward the constitutional rights of our clients and patrons. Our policies, rules, regulations, and practices should scrupulously recognize the pupils' rights and we must make the full effort to deal fairly, openly, and professionally with pupils and their parents.

Those among us who push for increased formalization of student rights through the judicial processes undoubtedly are motivated by sincere concern that students be accorded their full and just protections. The courts can respond with clearly delineated decisions and procedural mandates. My concern is that the schools may respond by giving children exactly what the courts specify--nothing less and nothing more.

5. Finally, we might be well advised to reexamine the mandatory attendance laws, our sometimes profligate promises to society, and our seemingly endless ambitions in program scope and social problem solving undertaken by schools--particularly in light of our demonstrably limited ability to intervene in the lives of some pupils. Must we continue to undertake tasks so obviously outside the skills, resources, and human capacity of our staffs? If we fail to differentiate our express or implied promises to the public, are we not to blame for predictable failures, alienation of clients, and loss of public confidence?*

## CORPORAL PUNISHMENT

The use and abuse of corporal punishment reaches far back into the history and traditions of our schooling processes. The Calvinistic notion of children as devil-possessed, tainted-at-birth creatures to be exorcised through firm, physical discipline is a recurring theme in the folklore of American common schools. The parallel notion of children as chattel property of their parents, with the parental right, duty, and legal sanction to restrain and guide the minor child with a firm hand, meshed neatly with the para-religious concept of youthful nature. As public education took on the tasks of rearing (in part) and educating (in larger measure) the child, the transfer of parent rights to the schools for discipline purposes was readily accomplished by the doctrine of in loco parentis (in place of the parent). Under this doctrine, the school authorities, particularly the teacher, stood in a parent-like relationship to the child and possessed the parent-like authority in matters of pupil supervision and discipline. Disregarding the question of educational efficacy, the fundamental problem in physical discipline of children is somehow to distinguish between corporal punishment and assault and battery.

The traditional judicial stance toward corporal punishment of school children was a fictional distinction between reasonable and unreasonable physical assault and battery by an adult on a child: Fictional in that the fine shading of "reasonableness" was a post hoc decision by the court under game rules decidedly writ-

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* Without intending to lay the ills of our school world on the due process doorstep, the recent embrace of the schooling processes and practices by constitutional law, in my judgment, sharply focuses on our largely unexamined and possibly remediable contradictions and illusions about the nature, purposes, and prospects of schooling as a social responsibility.

ten and refereed by adults long on piety and short on equity. Fictional further in the elusive standards of what punishment an imaginary "reasonable parent" would have inflicted on the child and against which the teacher's corporal punishment was measured. Simply put, schoolhouse batteries of children by adults was legally permissible so long as the teacher was free of malice and used reasonable restraint appropriate to the age and size of the child and the gravity of the offense. Translated into educational folklore this meant "smile and don't close your fist." The rationale for judicial support of corporal punishment was stated succintly in the recent case of Sims v. Waln,[44] wherein the court said:

> A teacher is responsible for the discipline in his school, and for the progress, conduct, and deportment of his pupils. It is his duty to maintain good order and to require of his pupils a faithful performance of their duties. To enable him to discharge such a duty effectively, he must have the power to enforce prompt obedience of his lawful commands. For this reason, in proper cases, he may inflict corporal punishment on refractory pupils.[45]

Two recent cases, Baker v. Owen[46] and Ingraham v. Wright,[47] illustrate the uncertain future of corporal punishment and reflect the developing concern for the constitutionally protected interests of school children and the uncertain distinctions between corporal punishment and its excesses. In the case of Baker v. Owen, plaintiffs (mother and son) claimed that their constitutional rights were violated when the plaintiff, Russell Baker, a sixth-grade pupil, was corporally punished over his mother's objections for allegedly violating his teacher's announced rule concerning play activities. Mrs. Baker had previously requested that the plaintiff not be corporally punished because she opposed it on principle. Mrs. Baker alleged that the administration of corporal punishment after her objections violated her parental right to determine disciplinary methods for her child. Russell Baker alleged that the corporal punishment denied his right to procedural due process and the punishment constituted cruel and unusual punishment violative of the Eighth Amendment to the federal Constitution. The plaintiffs' claims challenged the constitutionality of the North Carolina statute empowering school officials to "use reasonable force in the exercise of lawful authority" to restrain or correct pupils and to maintain order.[48]

The court rejected Mrs. Baker's claim that the corporal punishment, administered over her objections, violated her fundamental right to determine the "custody, care, and nurture" of her child, as implied in the liberty concept of the Fourteenth Amendment. On that point, the court said:

> . . . regardless whether the specific parental interests involved in Meyer,[49] Pierce,[50] and Prince[51] should be considered fundamental, and without disparaging one with Mrs. Baker's right to decide the methods of punishment to be employed by herself or other private parties, we cannot say that her right of total opposition to his corporal punishment is fundamental in a constitutional sense.[52]

The court found that the defendants could justify the corporal punishment by showing that it furthered a legitimate state end. So long as the force used is reasonable, school officials are free to use corporal punishment for disciplinary purposes.

As to Russell Baker's claim that the punishment violated his rights of due process, the court found that he had a legitimate liberty interest in avoiding unnecessary or arbitrarily inflicted punishment and undertook to fashion a remedy

accommodative to the child's interest and the state's interest in effective discipline. That portion of the opinion deserves full statement here:

> . . . plaintiffs request only those minimal procedures necessary to protect the student's interest without undercutting the disciplinary value of the punishment. We believe such procedures are few in number, but that is not to downplay their importance. First, except for those acts of misconduct which are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means--keeping after school, assigning extra work, or some other punishment--will insure that the child has clear notice that certain behavior subjects him to physical punishment. Second, a teacher or principal must punish corporally in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; the requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment. And finally, an official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.[53]

The court found the state statute authorizing corporal punishment to be constitutional but that its implementation without due process safeguards would violate the requirements of the Fourteenth Amendment and that the corporal punishment, in this case, did not violate the Eighth Amendment. The case was appealed to the U.S. Supreme Court and was affirmed there without opinion.

The case of Ingraham v. Wright raised similar constitutional issues on a somewhat more compelling factual background. Plaintiff parents brought suit against the defendants for inflicting corporal punishment on their children for alleged misbehavior in school. The complaint consisted of three counts:

1. Corporal punishment constitutes cruel and unusual punishment in that its application is grossly disproportionate to the alleged offense.

2. Corporal punishment is arbitrary, capricious, and unrelated to achieving any legitimate educational goal and thus deprives all students of liberty without due process. The failure of the defendants to promulgate a list of school regulations and corresponding punishments increases the capriciousness of the punishment.

3. Defendants' failure to provide any procedural safeguards prior to inflicting corporal punishment constitutes summary punishment and deprives students of liberty without due process of law.

The district court dismissed all three counts and plaintiffs appealed. The Court of Appeals of the Fifth Circuit (498 F.2d 248) reversed and remanded. The cause was heard by the Court of Appeals.

This court, in examining the "cruel and unusual punishment" claim, noted that the Eighth Amendment, by its legislative history and subsequent interpretations, was intended to be applied only to punishment invoked as a sanction for criminal conduct. The court was sympathetic to plaintiffs' allegations as to the severity of the beating administered:

> We do not mean to imply by our holding that we condone child abuse, either in the home or in the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by (the state statute and the school board policy). . . . The basis of such actions is, however, tort and criminal law, not federal constitutional law.[54]

The court concluded that the administration of corporal punishment in the schools, regardless of the excesses in its administration, does not come within the scope of the Eighth Amendment protection.

As to the questions of substantive due process violations, the court noted that corporal punishment was reasonably related to the states' legitimate interest in maintaining discipline and noted:

> Without the existence of disciplinary sanctions for misbehavior, students who desire to learn would be deprived of their right to an education by the more disruptive members of their class. We are unwilling to hold that corporal punishment . . . has no "real and substantial relation to the object sought to be attained."[55]

The court, in examining the issue of the denial of procedural due process, referred to Baker v. Owen but observed that the district court's pronouncements on procedural safeguards were not before the Supreme Court and its approval of the district court's judgment does not bind the Courts of Appeal to a part of the judgment not appealed. The Circuit Court of Appeals, distinguishing the procedural safeguards required in school suspensions (Goss v. Lopez, supra) and the less substantial liberty interest threatened by a spanking, in affirming the district court's dismissal of the complaint, concluded:

> In essence, we refuse to set forth, as constitutionally mandated, procedural standards for an activity which is not substantial enough, on a constitutional level, to justify the time and effort which would have to be expended by the school in adhering to these procedures or to justify further interference by federal courts into the internal affairs of public schools.[56]

The case has been appealed to the U.S. Supreme Court which may resolve the apparent conflicting views of the applicability of the Eighth Amendment to corporal punishment in the schools and the due process procedural safeguards announced in Baker v. Owen. The widespread reexamination of corporal punishment as a discipline tool seems long overdue; the Supreme Court may resolve its legal status, but the pedagogical justification and educational efficacy likely will remain open issues for some time to come. As Naomi Chase has pointed out,[57] corporal punishment may have become "institutionalized violence" against our children. It may be so deeply embedded in and reinforced by our culture as to defy reformation, regardless of any evidence of its pedagogical need or educational irrelevance.

## EDUCATIONAL MALPRACTICE

This section examines a recent case dealing with educational malpractice, one of the most interesting notions to come onto the educational law scene. The case, Peter Doe v. San Francisco Unified School District (Superior Court of San Francisco County, Case No. 653-312), examines the concept and consequences of educational practices and procedures which, in fact, do not lead to student learning. In the light of widespread public disillusionment and alienation about the efficacy of schools and schooling, particularly with reference to demands for educational accountability, this case raises important questions for schools at all levels. The notion that schools and school professionals should be legally responsible, at least in part, for pupil learning is both a novel legal theory and a chilling threat to the policies and professional practices of school people at all levels in the system.

Malpractice is traditionally a concern for members of the medical profession and, to a lesser extent, lawyers, accountants, and other professionals serving the public. The basic idea behind malpractice is to hold practitioners of a profession legally liable for injuries caused by their failure to meet accepted standards of competence in their practice. As the term implies, the professional is held responsible for mal (bad) practice, defined by establishing the standards of good practice, and charging those whose performance falls below or outside such standards for any injury or damages resulting from their bad practice. This is not to hold professionals as insurers of results; doctors lose patients and lawyers lose their clients' cases without facing automatic liability for the unhappy results. Malpractice, in the traditional sense, implies that legal liability attaches only for bad practices which cause injuries or loss. If the professional performed competently in line with the accepted standards of the profession, the death of the patient or the client's loss in a court case does not place legal liability on the practitioner.

Moving the malpractice concept into education is appealing to many people for its simple (though misleading) analogy as a means of assigning fault for alleged "bad" schooling. The simple appeal of malpractice seems to stem from the conviction that two equations adequately explain schools, schooling, and learning: (a) "If I teach, you learn," and (b) "If you do not learn, I did not teach." The attractive, simple formulae are substantially misleading for reasons to be discussed. Even more misleading, however, is the distortion of the basic concepts of practice standards underlying the malpractice notion. The Peter Doe case ignores the matter of practices and standards of practice and goes to the presumptive conclusion that if Peter Doe didn't learn, the fault obviously lies in the teaching and schooling. To deal properly with malpractice in schooling, the limits of professional practices must be ascertained and the behavior of the defendant teacher or administrator measured against such standards.

Peter Doe was graduated from a San Francisco High School in 1972 after spending 12 years in the school system. Despite his average or slightly above-average intelligence (as measured by the district's tests), an average attendance record, and a "clean" disciplinary record, Peter Doe couldn't read above fifth grade level. Thus the anomaly of a high school graduate who is a functional illiterate. Peter apparently played the game by the school district's rules and lost (he couldn't read) by winning (graduated from twelfth grade).

He filed a civil complaint against the school board, the seven board members, the district superintendent, and "Does" numbers 1 through 100 (the designation of those defendants not identified by name at the time of the suit). He sought

$500,000 damages for the defendants' negligence which deprived him of a fundamental necessity--literacy. Peter Doe charged the several defendants with liability for his injury which, he claimed, was caused by their "negligent, careless, and callous discharge of their constitutional and statutory duties." In the language of negligence, he said, in effect, "Defendants, you had a number of duties owing to me; you breached those several duties, and I was injured thereby. You are liable to me for damages caused by your failure to perform effectively."

The plaintiff's complaint stated seven specific charges:

1. The defendants negligently failed to use reasonable care in discharging their duty to provide adequate instruction, guidance, counseling, and supervision in basic academic skills

2. The defendant school misrepresented the plaintiff's true performance in basic academic skills to plaintiff's mother and misled her by concealing the school's lack of knowledge of his true performance

3. Defendant district and defendant board violated their statutory duty to keep parents and guardians accurately informed as to pupils' educational progress and achievements

4. Defendant district violated its constitutional and statutory duty to instruct plaintiff and other students in the basic skills of reading and writing

5. Defendant district failed to adopt high school graduation requirements which equal or exceed the minimum prescribed state standards (eighth grade reading performance or take a one-semester reading course)

6. Defendant board violated a statutory duty to monitor and modify the curriculum and the school operations so as to promote the education of pupils

7. Defendant district violated its statutory duty to design the course of instruction to meet the needs of the pupils for which the course of study is prescribed.

In sum, then, the complaint said, "Defendants, the California constitution and the school code require that you perform certain professional duties aimed at educating pupils like me; you failed to perform those duties and I have suffered the injury of illiteracy by your negligence. I'm holding you legally liable for my injuries."

The defendants demurred to all causes of action for two reasons: (a) the seven charges in the complaint do not state a cause of action, and (b) the charges of fraud and misrepresentation are absolutely barred by the state law. In essence, the defendants said, "Plaintiff, what you charge may or may not be true but, regardless of whether the charges are true or not, they do not constitute a wrong for which the laws offer a remedy." As to the charges of negligence, the defendants based their response on two principles of law: (a) the school owes no legal duty to the plaintiff to teach specific content or in a particular way so as to cause learning or to inform the pupil of his progress or problems, and (b) the personal interests claimed by the plaintiff are not protected by the law of negligence.

The legal question raised in this case is whether the pupil's interest in learning specific skills (reading and writing) taught in the public schools is protected by the law of negligence. The critical element in the case is whether the constitution and state statutes of California imposed such duties on the defendants in their conduct of schooling as to create in the plaintiff a right to have such duties performed on pain of tort action for their breach. In order for Peter Doe to recover damages, he must show that the particular duties were owed to him by the defendants, that they breached one or more duties owed to him, and that he was injured by the breach.

The reasons for a pupil's learning are more complex than the simple maxim "I teach--you learn." Defendants argue that the court must balance the social utility of schooling as a public activity against the individual's particular interests (his individual need, desire, motivation to learn, etc.). In defendants' view, public policy would dictate that the school's and the teachers' tort liability be confined to the reasonable care and protection of the pupils from physical harm. The defendants' basic defense is postulated on the notion that tort liability of the school and the teachers should extend to custodial services but stop short of the pedagogical services offered and rendered.

The plaintiff lost at both the trial and first appellate levels. The case has generated widespread debate over the nature of school offerings and the proper scope of legal duties owed by schools and school people to pupils and their parents.[58] Peter Doe states an all-too-familiar case in his complaint and engenders an immediate sympathetic response to the plight of ignorance suffered by countless numbers of pupils caught up in the school machinery. To continue in the schools for 12 years, passing regularly from grade to grade without learning to read beyond fifth grade level, and then to be graduated with the diploma certifying an "education" is appalling. If, indeed, the facts alleged are true (and there is no reason to doubt them), Peter Doe's complaint is a tragic indictment of public schooling turned sour and worse than useless in that mandatory attendance in such a hurtful system denies even the accidental relief available to the chronic truant. The educational wrongs and the personal tragedy in this case need no elaboration. The district, the board, the managers, and the teachers are wrong to allow the Peter Doe tragedy to occur once or ever again. But should the wrongs be torts? If the diagnosis of Peter's needs and the instruction failed, should such failures lead to remedies in negligence law and to money damages?

I believe the law is fundamentally incapable of solving the problems behind Peter Doe's complaint. The problems, complex as they are, involving highly technical matters of diagnosis and remediation of pupil learning problems, teacher instructional problems, the schools' systemic organizational problems, and the state's (society's, if you will) means-ends problems, likely can be solved but not by the courts or the law. The best the law can do is to determine acceptable levels of professional practice, as in medicine, law, or other "people-performance" professions; articulate those standards of performance or practice through a series of case opinions; and measure the individual defendant's performance against the standards on pain of liability for malpractice. The standards of pedagogical practice can be defined by expert testimony in the same fashion as are the physician's or surgeon's standards. The articulation of these "standards" of teacher, administrator, board member, et al. performance can be accomplished over a period of time in a span of fact-specific cases. A body of practice standard law would emerge as the yardstick against which a particular teacher's pedagogy would be measured. The wise teacher or school professional, of course, would apprise himself of such standards and follow them assiduously in order to perform free of negligence and, thus, free of tort liability. Even so, I suspect

some children would somehow fail to learn some skill, whether it be reading, counting, or playing the tuba. What then?

Where would the law turn for its basic definition of professionally and legally accepted performance standards? Other than expert pedagogues, on whose judgment of standards of teaching should the court rely? Given the philosophical and political merit of turning to both the producers and consumers of instruction and schooling practices, the net result could be a series of articulated practice standards, legally safe but of doubtful education effect. Peter Doe's complaint represents one consumer for whom the defendants' efforts failed. I am not persuaded that the law can solve the Peter Doe problem by imposing tort liability for a victim's failure to learn. A more likely solution and a more efficacious approach may come through political routes and through improved capacity to diagnose and remediate learning problems. Our diagnostic skills (and, hence, our remediation probabilities) are in a primitive state, barely above the level of witchcraft. Our definitions of learning problems turn on elusive variables and lead few observers (or practitioners) to any sense of confidence as to why anyone learns or fails to learn anything.

We tend to frame educational goals in terms of learning outcomes rather than offerings and promised teaching behaviors. Consumers are encouraged to expect the schools to produce learning, when in truth the schools and school people can, at best, create fair opportunities for learning. There is a significant difference between learning and the opportunity for it to occur. Whatever else the learning process includes, it seems to require some transaction between the teacher (person, experience, event) and the learner. This transaction seems to be a shared responsibility of both parties to it. The schools properly can be held responsible for constructing the most favorable learning opportunity, under existing circumstances. To the extent that the learning environment can be controlled by the schools, responsibility should follow. It seems foolish, however, to place on the schools responsibility for learning environment elements outside their control.

Although the imposition of legal liability on the school enterprise for a pupil's failure to learn is an attractive political/legal proposition, it assumes a cause-effect relationship between "teaching" and "learning" not warranted by any evidence. This is not to free the schools from any duty toward pupils; it is to say, however, that misdefined school duties may fix liability but will not cause learning. Schools should be held accountable for the nature and quality of the education offered in the schools. This accountability places the school's duty on variables of content, instruction, counseling, and the like over which it has reasonable control. The school has little control of the learner; the elusive variables in the individual which cause a learning transaction are essentially outside the school's control.

Peter Doe illustrates a challenging new approach to consumer action in public schooling. Although the law does not presently define negligence to include a pupil's failure to learn or a teacher's failure to teach, it seems reasonable to expect continued public interest in the role and responsibilities of teachers and schools and the legal relationships between teacher and pupil.

## COLLECTIVE BARGAINING IN THE SCHOOLS: A BRIEF OVERVIEW

Teachers entering practice today are likely to confront the question of union membership early in their career. Few beginning teachers will have more than a passing acquaintance with the issues, problems, and consequences of

teacher organizations, teachers' strikes and strike threats, and related labor relations matters; the preservice teachers usually are shielded from such reality by preparation programs and professional courses designed long before collective bargaining developed in the educational arenas. This general lack of information about collective bargaining places the new teachers at a disadvantage in their initial teaching assignments. They are unduly vulnerable to propaganda from teachers unions and "management" views alike and find themselves cast into conflicts they neither understand nor feel prepared to resolve on the merits. Such ignorance is hardly becoming to the profession they enter and even less salutary to their functioning as responsible young members of a profession devoted to reason, analysis, and deliberated action. A brief overview of the background, issues, and legal bases of collective bargaining in the schools may prove useful to young teachers as they attempt to define their views and commitments in the harsh realities of the teacher's life.

Negotiations between teachers and school boards have emerged over the past decade as one of the major issues in school governance. Demands by teachers for increased voice in decisions about salaries, curriculum, class size, and a broad range of school policies are an accepted part of the school scene in practically every state.[59] Since the 1962 United Federation of Teachers contract with the New York City School Board, the spread of negotiated teacher-board agreements has been incredibly rapid and dramatically evident. Strikes and threats of strikes by teachers are reported almost daily in the media, and increasing numbers of teachers are caught up in the collective bargaining processes and work under contracts negotiated with school boards.

Teacher-board negotiations do not connote friendly "requests" by polite teachers, but rather conjure up a much harsher reality. The negotiations practiced today closely resemble the process and strategies of sophisticated union-management bargaining in the private sector. The terms "professional negotiations" and "collective bargaining" are used interchangeably in describing teacher-board relations. Early in the negotiations movement, West[60] attempted to distinguish the two terms.

| Professional Negotiations | Collective Bargaining |
|---|---|
| 1. Removes teachers from operation of labor laws and precedents. | 1. Teachers subject to labor laws and precedents. |
| 2. Includes all members of the staff, including administrators. | 2. Assumes teacher-administrator conflict of interest and excludes administrators. |
| 3. Permits single bargaining unit. | 3. Fosters segmentation of teacher group. |
| 4. Resolves impasses through educational channels. | 4. Uses industrial-oriented labor boards. |
| 5. Administrator assumes dual role of professional leader and school board's executive officer. | 5. Relegates administrator to single role as "agent of the management." |

Weil argues that attempts to substitute "professional negotiations" for "collective bargaining" simply confuses an otherwise clearly-understood relationship.[61]

Alleging that much mischief has been done by the attempted substitution, he notes that the term "professional negotiations" ". . . has been used to describe a relationship between teachers and school boards which is supposed to be somehow different from collective bargaining"[62] but in fact is not different and may serve only to impede communication. Whether we call the teacher-board dialogue "negotiations" or "bargaining," the result is the same: teachers seek greater control over the levers of power in school decisions.

As teachers organized to seek increasing roles in school decision making, school boards and administrators found decreasing refuge in their once-sacred "prerogatives." Whichever items weren't bargained about yesterday or today will show up at tomorrow's negotiation session. It might be comforting to believe that teacher militancy, demands, and negotiations are simply a passing phenomenon and that once teacher organizations are established and secure, the teachers' negotiating "urge" will wither and die.[63] Alas, such seems not to be the case at all.

What began as an effort by teachers to equalize board power may well develop into a do-or-die struggle to control the total education enterprise. The initial teacher concerns over salaries and living standards have expanded into policies, budgets, credentialing, job security, and the fundamental means-ends questions about schooling. The scope of negotiations has expanded to include practically every conceivable issue in the school process. Wildman's analysis of the "what's negotiable?" issue clearly recognizes the blurred edges of "policy" (generally nonnegotiable) and "working conditions" (generally negotiable) and urges boards to preserve fundamental policy matters for their unilateral decisions.[64]

This section examines the nature and development of teacher-board negotiations as they impinge on the school operations and suggests some consequences for teachers and administrators in their professional work. From the premise that negotiations are generally adversary, power relationships, the examination reviews the historical perspectives of teacher-board negotiations, with brief reference to the state legislation concerning negotiations, data on teacher strikes and work stoppages, and selected court cases dealing with negotiations. From these broad perspectives of teacher-board negotiations, the implications for teachers and administrators should emerge.

## HISTORICAL PERSPECTIVES OF TEACHER-BOARD NEGOTIATIONS

Although the first incident of bona fide negotiations between teachers and school boards may be lost in history, two events are of special significance. The enactment of the Wisconsin Municipal Employee Relations Act[65] in 1959 and the UFT strike against the New York City board in 1962 are generally recognized as turning points in the negotiations "movement." Prior to these two events, the teacher organization movement had little concern with negotiations in a formal sense.

Table 2 indicates the growth of collective bargaining agreements from 1966 to 1972.

Virtually all of the agreements are with local teacher unions affiliated with either the National Education Association (NEA) or the American Federation of Teachers (AFT); independent teacher organizations account for only a small fraction of the negotiated contracts.

Teachers organized in the mid-nineteenth century through the association later to be known as the National Education Association. These first organizations were concerned fundamentally with professional matters and the NEA largely ignored the teachers' economic interests.[66] Responding to this void, Chicago teachers

TABLE 2

CLASSROOM TEACHER COLLECTIVE BARGAINING AGREEMENTS

1966-67, 1968-69, AND 1970-72

| Year | Number of Agreements | Number of Teachers |
|---|---|---|
| 1966-67 | 389 | 208,433 |
| 1968-69 | 1,027 | 448,142 |
| 1970-71 | 1,825 | 737,024 |
| 1971-72 | 3,958 | 1,482,471 |

Source: Negotiations Research Digest 6 (2): 19; October 1972.

affiliated with the Chicago Federation of Labor in 1902 and similar independent teacher organizations were founded in other large cities. The American Federation of Teachers (AFT) was formed in 1916 in affiliation with the American Federation of Labor. Within four years, the AFT membership (11,000) exceeded that of the NEA despite the latter's 50-year edge in experience.[67] An "anti-union" campaign initiated within the NEA pushed the NEA and the AFT into sharp competition for membership.

As early as 1935, the AFT advocated collective bargaining by teachers, a position unacceptable to the NEA until 1962.[68] During the interim, the NEA developed a series of "sanction" procedures to use against "offending" school districts. These sanctions (ranging in severity from advising teachers of unsatisfactory working conditions in a school district to "requesting" members not to accept positions in the district under pain of expulsion from the NEA) were applied to numerous districts[69] and still constitute official policy, but have been discarded operationally in favor of other pressures, including the threat of strike.[70]

Since 1965, both the NEA and the AFT teacher organizations have called strikes and little, if any, distinction is evident in the organizational strategies and tactics of the two unions. The initial teacher-board negotiations experiences generally were unsophisticated, awkward confrontations generating more heat than light on the emerging issues. Carlton identified the attitude evolution in negotiations[71] as a three-stage process including nativity (stage 1), adolescence (stage 2), and maturity (stage 3), with parallel descriptors of teacher attitudes, board-administration attitudes, and negotiations. In stage 1, the teachers experienced guilt and hesitation; the board and administrators were "shocked" and in a state of decisional paralysis. Negotiations at stage 1 were described as confused and inept. At stage 2, the negotiations manifest hostility, frustration, "we-they" syndrome, with distributive bargaining (what do we get for our side), and the teachers' "hard-nosed" demands are met by stubborn refusal or grudging acquiescence. At the maturity (stage 3) level, Carlton notes, ". . . experiential background in negotiations increases, a more positive attitude tends to develop . . . (and) mutuality of educational concern tends to emerge on both sides of the bargaining table."[72]

As negotiations mature, a spirit of accommodation seems to develop and, given issues for which mutually advantageous solutions are possible, integrative (what's

best for both of us and the schools) bargaining occurs. As negotiations spread to districts in all parts of the county and as teachers and boards mature in their negotiating relationship, we should expect to see a more productive (for the school process and the pupils) outcome from the process. The movement to revest increased educational power (funds, policy making, governance, etc.) in the states may alter the development prediction, however. The tendency to push teacher-board disputes to the state level may prompt state legislatures to rethink the wisdom of local district bargaining legislation and encourage drastic revision of bargaining statutes.[73] If labor legislation does not, in fact, achieve the anticipated harmony and peace in teacher-board relations, there is reason to expect a redirection of legislative efforts and, consequently, a major shift in the future of teacher-board negotiations.*

## THE NATURE OF NEGOTIATIONS

The terms "professional negotiations," "collective bargaining," and their mongrel derivative, "collective negotiations," have been kicked around in the teacher-board conflict for several decades. These terms, meaningful perhaps only to their users, have promoted more confusion than illumination primarily because they are coined terms in the education context. Most school district teachers and other employees were organized long before the more sharply focused objectives of negotiations developed. The thousands of "faculty associations" of the 1950's and earlier were organizations but operated more as professional forums and social clubs than as adversary bodies toward the board. Not infrequently the salary and working conditions "requests" were developed by a "welfare" or "salary" committee of the association and discussed only with the superintendent or his administrative agent, who guided the requests into a form and amount previously determined by the school board. Negotiations with the board, either directly or through negotiating representatives of the board, were alien to the experience of the vast majority of teacher associations. For the purpose of this examination, the term "negotiations" is used to embrace the teacher-board relations implicit in the three terms. There is little advantage in pressing for distinctions without differences.[74]

Wildman defines collective bargaining as ". . . a power relationship and a process of power accommodation, the essence of which is compromise and concession-making on matters over which there is conflict between the teacher organization and the board."[75] There is no implicit duty for the board, either in this definition or in the labor laws applicable to public sector bargaining, to abdicate responsibility, capitulate on disputed matters, or even to agree with the teachers on the dispute. The basic responsibility of both parties is to bargain in good faith. Obviously, when intent is at issue, the degree of good faith present at negotiations may be an arguable perception.

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* An example of emerging issues likely to trigger legislative/judicial confrontation can be found in the case of Abood v. Detroit Board of Education, 60 Mich. App. 92 (1975). In that case, nonunion teachers and others challenged the authority of the Detroit school board to enter into a union agreement requiring the compulsory payment of an "agency shop fee" by nonunion teachers to the Detroit Federation of Teachers. The fee is required of nonunion employees as a "fair share" contribution to help pay the cost of collective bargaining and is authorized by state law in Michigan. The case has been appealed to the U.S. Supreme Court and a decision is expected early in 1977.

In the private sector, the purpose and effect of collective bargaining has been to give employee organizations increased control over the decision-making processes of management. Regardless of the avowed purposes of teacher-board negotiations, the effect sought by teachers is a similar increased control over the educational decisions.[76] The expansion of bargaining scope over the first decade of widespread teacher-board negotiations is clear evidence of the trend toward increased teacher control in decision making. The teachers' economic interests in salaries, fringe benefits, and the like were but the opening salvo, and the targets now include teacher participation in credentialing (who shall teach), curriculum (what shall be taught), supervision (how teaching shall be performed), and policy making at all levels (to what ends education shall be directed). Whether or not Carlton's "maturity" phase and the "spirit of accommodation"[77] to shared educational outcomes will develop is not yet clear.

Collective bargaining practices suggest some generalizations applicable to the negotiations process. First, they negate the notion of unilateral decision making by either party in those matters subject to negotiations. Unless either the teachers or the board is completely overpowered in the process, the gist of negotiations is bilateral or shared decision making.[78] Negotiations imply give and take between parties capable of exerting some undesired consequences on the other and capable, likewise, of conferring some desired benefit. Negotiations proceed on the assumptions that teachers have the rights to organize,[79] elect representatives, negotiate with the employer school board on the basis of equality, and enter into written, signed agreement establishing the terms and conditions of employment and other matters as the parties may, from time to time, determine.[80] The negotiations process further assumes mutual willingness, if not desire, to engage in good-faith dialogue toward the solution of an agreed problem or dispute. Negotiations go beyond "discussion," "meeting," or "conferring" intent; the heart of the process is the implicit capacity of each party to hurt the other if an agreement is not reached. Such capacity makes "game-playing" or "charades" by either party both unprofitable and unlikely. Although the roots of teacher-board negotiations grew out of collective bargaining in the private employment sector, the process has adapted to the circumstances unique to the professional self-perceptions of teachers.[81] The net result seems to be that negotiations in many school districts have elements of both labor-oriented collective bargaining and professionally-oriented problem solving.

When the negotiations fail to reach agreement, mediation, arbitration, and factfinding may come into play. Mediation is a process whereby the parties at impasse agree to permit a third party (presumably "neutral") to seek a resolution of the impasse but both reserve the right to ignore the mediator's recommendation. Arbitration, on the other hand, involves the parties' agreement to abide by the decision of the third party arbitrator ("advisory" or nonbinding arbitration is essentially mediation). Few boards of education have agreed to arbitration for the reason that it amounts to an abdication or unlawful delegation of the board's legal authority to manage the schools. The 1970-71 NEA survey of 1,529 comprehensive negotiated agreements indicated that 460 agreements provided for advisory impasse-resolution procedures, but only 9 agreements included binding decisions on impasse.[82] Factfinding is a process wherein an independent third party seeks out the facts related to the dispute and presents such facts to the parties (and the public) in the expectation that the pressure of the facts will stimulate a settlement. Substantial numbers of negotiated contracts provide for one or more of the three impasse-resolution procedures.

## SCOPE OF NEGOTIATIONS

Teacher-board negotiations grew out of the teachers' concern over salaries and those economic interests generally subsumed under "fringe benefits." The labor union concern over "working conditions" was early on translated into the experience and ultimately the legislation for teacher-board negotiations. The New York City contract of 1963 was one of the first instances in which the negotiated teacher-board agreement moved beyond economic concerns into what might be called "educational" or "policy" matters. The issues of class size; school calendar (the school day and the school year); curriculum; physical security of the teachers; qualifications for employment; hiring, firing, and reduction in force procedures; and the like clearly focus the fundamental problem: "What is negotiable?" Stated even more bluntly, the issue is: "How can policy (generally accepted as the nonnegotiable responsibility of the board) be separated clearly from working conditions (generally regarded as negotiable)?" For example, salaries are evidently related to working conditions, but the economic consequences of salary decisions impinge clearly on board policy. Employee transfers are generally regarded, both in public and private employment, as within the scope of "working conditions," but in some districts, particularly the large urban centers, the transfer of teachers is critical to board policy for desegregating the schools. This expansion of scope is supported by both AFT and NEA policy. The NEA defines bargaining scope as all matters affecting the quality of the educational program, and the AFT considers appropriate bargaining as anything affecting the working life of the teacher.

Wildman noted a decade ago that "Increasingly, contracts are providing for teacher organization representation in curricular, textbook, and educational policy decision-making generally. . . ."[83] Provisions for Educational Policy Committees in numerous school district-negotiated agreements are further evidence of the expansion of bargaining scope. The analysis of the NEA survey of 1966-67 negotiated agreements coded 150 content items; by 1970-71, the coded items exceeded 300. Even allowing for inflated rhetoric, the expansion of negotiable items seems clear. The analysis of negotiation legislation to follow indicates that the legislative language concerning the scope of bargaining leaves rather broad interpretation of specific bargainable issues to the negotiation process. One thing seems clear, even on a superficial review: there are no clear agreements as to "excluded" subjects and the once-safe management prerogatives are under steady attack through negotiation legislation, judicial interpretation, and negotiation practice. The distinction between "policy" and "nonpolicy" is not at all clear, and to define bargaining scope in such terms tells one very little about the scope of negotiations as they emerge from the dynamics of the bargaining table.

## COLLECTIVE BARGAINING LEGISLATION AND CASE LAW

As of November 1975, 30 states had enacted legislation requiring or permitting either collective bargaining or that school boards "meet and confer" with K-12 teacher organizations on one or more issues. Of these 30 states with legislation, 6 require only that boards meet and confer with the teacher unions[84] and 24 require some kind of collective bargaining.[85] The other 20 states have neither collective bargaining nor "meet and confer" legislation. Collective bargaining between teachers and school boards occurs in Illinois under the authority of a court decision.[86] Recent data indicate that 312 Illinois school districts engage in collective bargaining with teachers despite the absence of

legislation on the subject.[87] The adoption of state collective bargaining legislation has little bearing on bargaining in a given state; the 1970-71 NEA survey indicated bargaining agreements in 39 states and legislation in only 28 states.

It seems likely that additional states will enact some kind of teacher-board negotiations legislation. Since 1941, in the Illinois General Assembly, for example, the House has introduced 15 bills and the Senate has introduced 12 bills concerning negotiations in the public employment sector. None of the negotiations bills has passed into law and only one, Illinois Senate Bill 427, in 1945, came before the governor for approval, which was denied by his veto.[88] One or more bills on the topic have been proposed during every biennial legislative session since 1945, and sooner or later the General Assembly will enact a negotiation law. There is no reason to expect other states to respond much differently from the pressures of national and state teacher organizations for appropriate legislation. A state-by-state compilation of collective bargaining statutes and an abstract of their salient provisions can be found in a recent publication of the Education Commission of the States, entitled '76 Update: Collective Bargaining in Education--A Legislator's Guide.[89] State laws change frequently and the reader is advised to consult the latest revised statutes to find the current status of legislation on collective bargaining in a particular state.

## TEACHER STRIKES

Until quite recently, teacher strikes were uniformly prohibited by statutory and case law. The interruption of government by strikes of its employees was generally considered unthinkable by the overwhelming majority of commentators. The express exclusion of public employees from federal labor legislation, including the Norris-LaGuardia Act (1932),[90] the National Labor Relations Act of 1935 (Wagner Act),[91] and the Labor-Management Relations Act of 1947 (Taft-Hartley Act), [92] reinforced the notion that private employee labor rights of organization and strike were not applicable to those in government service, including teachers. The fundamental argument against teacher strikes is the concept of governmental immunity from concerted action by any of its citizens or, more simply, the government can do no wrong. Under this concept, founded on the ancient doctrine that the King, as God's servant, cannot do wrong and thus need offer no redress, the strike by public employees amounts to intolerable (and prohibited) threat to the government. Supportive arguments grew up around the anti-strike concept, including the notion that government must suffer no interference, the absence of profit motive as distinguished from private sector employment, and the fear of government paralysis. Governmental immunity to tort liability has been overturned in many states,[93] and the rationale for anti-strike laws is under severe attack on the theory that the burden to prove damaging interference with governmental processes ought to be on those who claim such results rather than on those whose rights are restricted by the prohibition.

Prior to 1960, teacher strikes were infrequent occurrences, and rarely were more than five strikes recorded annually prior to 1964.[94] Starting in the 1964-65 school year, the number of teacher strikes increased rapidly to a peak in 1969-70, when a total of 183 teacher strikes involving an estimated 105,000 school personnel were recorded. The following year (1970-71) recorded 152 strikes and the total for 1971-72 was down to 87. Table 3 presents data on teacher strikes from 1960 through the 1973 school year.

TABLE 3

TEACHER STRIKES BY SCHOOL YEAR, 1960-1973

| Year | Number of Strikes | School Workers Involved | Man-Days Idle During Year |
|---|---|---|---|
| 1960 | 3 | 5,490 | 5,490 |
| 1962 | 2 | 2,200 | 3,000 |
| 1964 | 12 | 15,083 | 27,453 |
| 1966 | 34 | 10,633 | 29,079 |
| 1968 | 131 | 128,888 | 2,733,802 |
| 1969 | 183 | 105,000 | 412,000 |
| 1970 | 152 | 94,800 | 935,000 |
| 1971 | 89 | 33,352 | 248,080 |
| 1972 | 87 | 33,900 | 207,300 |
| 1973 | 117 | 51,400 | 620,700 |

Adapted from data presented in NEA Research Memo 1972-18, October 1972, and Work Stoppages in Government, 1973, U.S. Department of Labor, Bureau of Labor Statistics, Report 437, 1975.

Teacher strikes are prohibited in all but five of the states with authorized negotiations. These five--Alaska, Hawaii, Oregon, Pennsylvania, and Vermont--provide for teacher strikes only under specific circumstances, but the crack in the anti-strike wall is significant. The Alaska statute (Ch. 113, L. 1972) classifies public employees into three classifications: (a) those whose services may not be given up for even the shortest period of time, (b) those whose services may be interrupted for a limited period but not for an indefinite period of time, and (c) those whose services may be sustained by work stoppages for extended periods without serious effects on the public. School teachers are in the second class and may engage in a strike after mediation by majority vote of a given bargaining unit. The limit of the strike is determined by the interests of the health, safety, and welfare of the public. The school district may seek an injunction to stop the strike, but the statute provides that the court must consider the impact of the strike on the public as well as the extent to which the teachers have met their statutory obligations. Arbitration is required if the strike is enjoined. For the first time in any teacher-strike statute, the burden is on the school board to show that the strike is hurting the public interest. Further, the statute recognizes the obvious truth that not all public employment is equally vital to public welfare.

A recent opinion from the Supreme Court of Rhode Island[95] suggests that the judicial practice of issuing injunctions to halt strikes requires more than just a request by the school board. The court noted that the issuance of a restraining order, without a hearing, at the request of the board assumes that a strike causes irreparable harm before any hearing can be had. In deciding that ex parte* restraining orders are not justified merely by a strike, the court said, "We must concede that the mere failure of a public school system to begin its school year on the appointed day cannot be classified as a catastrophic event. We are also

* An order requested by one party to a suit without a hearing on the issue.

aware that there has been no public furor when schools are closed because of inclement weather, or on the day when a presidential candidate comes to town, or when the basketball team wins the championship."[96] The importance of the decision lies not in its result (teachers have no right to strike), but in its recognition that the general practice of enjoining strikes without any proof of harm to the public good must be suspect and that evidence of public harm must be presented to justify the issuance of a restraining order. The opinion reveals one more crack in the rationale supporting the bar to teacher strikes.

The provisions concerning teacher strikes in the Hawaii and Pennsylvania statutes exemplify the current reconsideration of the traditional anti-strike view of public employment labor relations. The Hawaii statute opens a limited right to strike provided that the teachers have taken antecedent impasse resolution steps. The Hawaii public employment relations board, composed of representatives of management, labor, and the public, passes on the legality of the strike at the request of the public employer. Section 12 of the Hawaii statute is set out here:

> Sec.-12. Strikes, rights and prohibitions. (a) Participation in a strike shall be unlawful for any employee who (1) is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the board or (2) is included in any appropriate bargaining unit for which process for resolution of a dispute is by referral to final and binding arbitration.
>
> (b) It shall be lawful for an employee, who is not prohibited from striking under paragraph (a) and who is in the appropriate bargaining unit involved in an impasse, to participate in a strike after (1) the requirements of section -11 relating to the resolution of disputes have been complied with in good faith, (2) the proceedings for the prevention of any prohibited practices have been exhausted, (3) sixty days have elapsed since the factfinding board has made public its findings and any recommendation, (4) the exclusive representative has given a ten-day notice of intent to strike to the board and to the employer.
>
> (c) Where the strike occurring, or about to occur, endangers the public health or safety, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent or present danger to the health and safety of the public, the board shall set requirements that must be complied with to avoid or remove any such imminent or present danger.
>
> (d) No employee organization shall declare or authorize a strike of employees, which is or would be in violation of this section. Where it is alleged by the employer that an employee organization has declared or authorized a strike of employees which is or would be in violation of this section, the employer may apply to the board for a declaration that the strike is or would be unlawful and the board, after affording an opportunity to the employee organization to be heard on the application, may make such a declaration.
>
> (e) If any employee organization or any employee is found to be violating or failing to comply with the requirements of this section or if there is reasonable cause to believe that an employee organization or an employee is

violating or failing to comply with such requirements, the board shall institute appropriate proceedings in the circuit in which the violation occurs to enjoin the performance of any acts or practices forbidden by this section or to require the employee organization or employees to comply with the requirements of this section. Jurisdiction to hear and dispose of all actions under this section is conferred upon each circuit court and each court may issue, in compliance with chapter 380, such orders and decrees, by way of injunction, mandatory injunction, or otherwise, as may be appropriate to enforce this section.[97]

The data from the collective bargaining legislation suggest a legislative intent to invest teachers and other school employees with rights to participate in school governance. The rationale and purpose of the legislation appears to focus around a perceived expectation of improved employer-employee relations through the negotiations process. The California statute (the Winton Act) exemplifies the legislative intent (and expectations):

> It is the purpose of this article to promote the improvement of personnel management and employer-employee relations . . . by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice and be represented by such organizations . . . and to afford certificated employees a voice in the formulation of educational policy. . . . This article is intended . . . to strengthen tenure, merit, civil service and other methods of administering employer-employee relations. . . .[98]

The statement of legislative findings in the Hawaii statute clearly includes the notion of joint decision making in school government:

> The legislature finds that joint decision making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas . . . with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work. . . .[99]

## SELECTED CASES ON TEACHER-BOARD NEGOTIATIONS

The court cases selected for brief review and analysis outline the major legal issues in negotiations, present the mainstream judicial thinking on these issues, and convey a sense of historical evolution in the rapidly-changing negotiation relationship. The cases illustrate the complex and frequently frustrating results generated by our public policy of assigning some educational problems which may have no clear solutions to a tribunal steeped in the tradition of win-lose judgments. Although the necessity of legal recourse for vital educational disputes is recognized, the consequences of reducing the issues to legal questions are not necessarily solutions. To silence a person, issue, or educational problem by deciding a legal question is not necessarily an answer. Within the

limited scope of available legal remedies, however, the fact that the courts make basic educational policy can hardly be doubted.

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Norwalk Teachers' Association v. Board of Education of the City of Norwalk, 138 Conn. 269, 83 A.2d 482 (1951)

The Norwalk Teachers' Association sought a declaratory judgment against the board of education as to the validity of a contract negotiated between the two parties. In April of 1946, the teachers struck over a disagreement on salary. After negotiations, the dispute was settled, and the teachers entered into a contract with the board. This contract, substantially the same as the one at issue, recognized the plaintiff teachers' association as the bargaining agent for its members, defined working conditions, and established a grievance procedure and salary schedule. This action raised and decided the following issues:

1. Right To Strike

   Public employees have no right to strike. Courts uniformly grant injunctions to forbid such strikes on these bases: public policy; interference with governmental function; illegal discrimination against the right of any citizen to apply for governmental employment (where the union seeks a closed shop). Government employees, as agents of the government, exercise part of the sovereignty of the government and thus, unlike private employees, they serve the public welfare. To allow employees to strike would be to deny the authority of government and contravene the public welfare.

2. Right To Organize

   In the absence of prohibitive legislation, there is no good reason to deny to public employees the right to organize. However, public employees do not have the right to organize for all the purposes for which private employees may organize. For example, a public employee union is not necessarily protected against unfair labor practices, nor is it guaranteed that it shall be the exclusive bargaining agent for all employees of the unit.

3. Collective Bargaining

   It is not an illegal delegation of the board's authority to allow collective bargaining on matters which are within its power to negotiate, e.g., employment, salary, grievance procedures, and working conditions. A board cannot, however, contract to surrender its legal discretion. It cannot, for instance, agree to hire only union teachers, an act which would clearly constitute illegal discrimination.

4. Arbitration and Mediation

   Similarly, arbitration and mediation are permissible with regard to specific arbitrable disputes. They cannot be employed, though, to surrender discretion or responsibility granted the board by state law.

The board's power to discharge a teacher for cause is one example of a responsibility which cannot be the subject of arbitration or mediation.

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City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947)

This case illustrates the problems in extending the collective bargaining processes of the private sector to public employees. The parties sought a declaratory judgment to determine whether the City of Springfield, Missouri, through its civil service commission, was empowered to enter into collective bargaining agreements with city employees. The Missouri legislature had provided for a civil service commission to govern the selection, transfer, tenure, promotion, salaries, and discharge of city officers and employees. The issues raised in the case were whether constitutionally-mandated collective bargaining applied to city employees and whether collective bargaining with public employees constituted illegal delegation of power. On these two issues the court noted:

1. The constitutional mandates for employer-employee collective bargaining do not extend to public employment. Public office or employment "never has been and cannot become a matter of bargaining and contract"; and

2. A basic constitutional principle holds that legislative powers cannot be delegated. To permit the civil service commission to bargain collectively with city employees would amount to a delegation of legislative powers. For that reason, the court argued, ". . . qualifications, tenure, compensation, and working conditions are wholly matters of lawmaking" and cannot be subject to bargaining or negotiated contract.

Over two decades later, by an opinion of the Missouri attorney general,[100] teachers were granted the right to make proposals to their school board but not necessarily the right (or expectation) to engage in collective bargaining.

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Board of Education of Community Unit School District No. 2 v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965)

In this case, the plaintiff school board sought to enjoin a strike and picketing by custodial employees of the district. The strike and picketing arose as a result of the school board's refusal to enter into a collective bargaining agreement. The issue presented here is not whether the board of education is permitted or required to enter into such agreement but rather whether the union's strike and picketing is lawful activity. Although the functioning of the school was materially affected by the strike and accompanying picketing due to the refusal of several service people to cross the picket lines, the trial court declined to

enjoin either the strike or the picketing for the reason that there was no effective showing of irreparable harm. On the two issues in the case, the Illinois Supreme Court held:

1. Right To Strike

   Citing numerous cases, the court concluded that a strike by public employees is illegal, since persons "exercising a portion of the sovereign power have no right to strike against the government."

2. Right To Picket

   Picketing is not the equivalent of speech but is speech plus conduct and, as such, is not entitled to the same wide protection as speech. The picketing should have been enjoined both because it was for an illegal purpose (a strike against the government) and because of its effect (to curtail a vital function of government--education).

As noted earlier, Redding did not decide whether school boards in Illinois could lawfully enter into collective bargaining agreements with teachers. The following case faced the question squarely and, to date, is the authority for negotiated agreements in Illinois public school districts.

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Chicago Division Illinois Education Association v. Board of Education, 76 Ill. App. 2d 456 (1966)

This case illustrated the problems inherent in relying on judicial interpretation rather than legislation to establish teacher-board collective bargaining. The decision also enunciated the concept that school boards may rely on implied power to bargain with teachers and need not look solely to expressed statutory authority. The Chicago Division of the IEA, plaintiff, and James Broman, a taxpayer, intervenor-plaintiff, filed suit against the Chicago Board of Education, as defendant, and the Chicago Teachers' Union as intervenor-defendant. Since 1964 the board had recognized the Chicago Division, the CTU, and the Chicago Principals' Club as collective bargaining agents for their members. The General Superintendent of Schools, with the board's approval, entered into a "Memorandum of Understanding" with each organization. It described procedures for the resolution of grievances.

The Chicago Division sought (a) to have its "Memorandum of Understanding" declared a valid contract, and (b) to restrain the board from conducting an election to allow its employees to select a sole bargaining agent. They also sought relief against two of the board's resolutions which they alleged breached its contract, and relief against claimed continued discrimination in favor of the CTU. Broman alleged in essence that the board, lacking express legislative authority, had no power to enter into any collective bargaining agreement. The issues, then, were: (a) whether the "Memorandum of Understanding" was valid and thus whether a sole bargaining agent could be selected if such action contravened provisions in the memorandum; (b) whether the board had the power to enter into collective bargaining agreements and thus whether it had the power to allow selection of a

sole bargaining agent; and, finally, (c) whether the board had given the CTU preferential treatment in certain cases. The trial court held:

1. The "Memorandum of Understanding" was a valid contract, but it could be terminated by either party by giving requisite notice

2. The board's resolution calling for a referendum for the selection of a sole bargaining agent was valid

3. Part of the second resolution, which alluded to negotiations with the CTU without reference to similar negotiations with the other unions, was held invalid

4. Any agreement entered into must contain a no-strike, no-picket clause (if the picketing would tend to disrupt the normal operations of the schools)

5. Any benefits accruing to the bargaining agent's members must apply equally to all similarly situated personnel

6. Should an impasse develop, the board's decision must be final.

The appellate court set out the arguments on both sides regarding the board's power to enter into a collective bargaining agreement. Broman's assertion was based first on the principle that, absent express legislative authorization, public employees have no right to bargain collectively. (It is undisputed that the Illinois legislature has not expressly granted such authority.) Second, he asserted that collective bargaining would necessarily involve an illegal delegation of the board's statutory powers and duties.

The board and the CTU countered that the power to bargain collectively is implicit in the board's power to contract to do all things "necessary and proper" for the operation of the schools. They also contended that collective bargaining does not necessarily entail an illegal delegation of power. The CTU argued further that collective bargaining is simply a facet of the board's broad discretion in contracting with teachers, and that absent a showing of unreasonableness, the court is powerless to interfere with such discretion.

The appellate court upheld the trial court on all issues and concluded that the Chicago board is empowered to enter into a collective bargaining agreement with a sole bargaining agent without express legislative authority.

The final case presented here, not solely a "collective bargaining" decision, discusses some significant questions of school government, due process requirements in dismissing public employees, and the policy implications in the balance of power in school labor relations.

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Hortonville Joint School District et al. v. Hortonville Education Association, 96 S. Ct. 2308 (1976)

In this case, the U.S. Supreme Court granted certiorari to the Supreme Court of Wisconsin to determine whether the school board members, vested by state law

with the power to employ and dismiss teachers, could, consistent with the Due Process Clause of the Fourteenth Amendment, dismiss teachers engaged in a strike prohibited by state law.

The case grew out of unsuccessful negotiations between the school board and the teachers' union which led to a teachers' strike midway in the spring semester of the school year. After numerous demands that the teachers return to work, the board voted to dismiss the striking teachers and hire others to replace them. The Wisconsin trial court granted the board's motion for summary judgment. The Wisconsin Supreme Court reversed, holding that the board was not sufficiently impartial to meet the requirements of constitutional due process in the dismissal proceedings; and the U.S. Supreme Court agreed to hear the case.

There was no question that the board's action to dismiss deprived the teachers of a property interest, protectable by the Due Process Clause of the Fourteenth Amendment; the sole issue was whether the board members were so biased as to disqualify them to render the impartial decision required by the process due under the federal Constitution. The Court, in holding for the board, could find no evidence that the board members had any personal or official stake in the dismissal decision, nor any evidence that the board's prior involvement in negotiations (its statutory duty under Wisconsin law) disqualified it to carry out its statutory duty to make the ultimate dismissal decision.

In concluding that the board was qualified to render an impartial judgment on the matter of teacher dismissal under the facts presented in the case, the Court noted the public policy concerns raised by the case:

> State law vests the governmental, or policy making function exclusively in the School Board and the State has two interests in keeping it there. First, the Board is the body with overall responsibility for the governance of the school district; it must cope with the myriad day-to-day problems of a modern public school system including the severe consequences of a teacher's strike. . . . Second, the state legislature has given to the Board the power to employ and dismiss teachers as a part of the balance it has struck in the area of municipal labor relations; altering those statutory powers as a matter of federal due process clearly changes that balance. Permitting the Board to make the decision [to discharge the striking teachers] preserves its control over school district affairs, leaves the balance of power in labor relations where the state legislature struck it, and assures that the decision whether to dismiss the teachers will be made by the body responsible for that decision under state law (at 2316).

## IMPLICATIONS FOR TEACHERS AND ADMINISTRATORS

The spread of teacher-board negotiations across the country and the rapid increase of negotiated agreements since the mid-1960s suggest that this is an idea whose time has come. Some observers might wish to believe that the negotiations process has been oversold by zealous salesmen from the NEA, the AFT, and their state and local units. Much has been said and written about the interorganizational rivalry between the two major teacher organizations and the rhetoric hints at dark motives and sinister conspiracies within teacher leadership.[101]

There is little doubt that the national labor organizations are interested in the spread of negotiations in the educational setting. The AFL-CIO has long supported the AFT drive to organize teachers, initially in the large urban areas

but now on a widespread, national base. The NEA has maintained its independence and non-alignment policies toward the other labor organizations, but there is little doubt that the strategies, tactics, and national concerns of the NEA coincide with those of organized labor.* Recent efforts to "merge" the NEA and AFT organizations failed, but the merger issue is not dead. All of this is simply to say that teacher-board negotiations have flourished and prospered not because of any "secret bankers" or "rich uncles" in the wings, but rather because a substantial majority of teachers in urban schools found in negotiations some needs satisfactions not available otherwise. The point is not whether negotiations are morally or professionally "right" but rather that negotiations are accepted by large numbers of teachers as their most powerful professional process available at this time.

It seems obvious, however, that the economic pinch of the 1970s may increase resistance to expanded bargaining rights in teachers and the general disenchantment with collective teacher action may stimulate serious resistance at the state level. The decentralization of educational intervention, resulting in more fiscal and social control of education by the states, could further blunt the drive toward formal negotiations. The federal withdrawal from direct intervention in education continues and may determine the course of collective bargaining at the district level. If the federal government backs off and stays out, the states will exert increased influence on the development of teacher-board relations in the schools. If a national public employment relations act** should be enacted by Congress, the future of state legislation and local district teacher-board bargaining could change dramatically.

The national teacher organizations probably will become more and more politically involved in the next few years. The levers of power generally lie in the political arena and it is no secret that power is the name of the game in the politics of education. Some sense of the political thrust can be drawn from a 1972 resolution adopted at the 1972 NEA Convention:

> Resolution 72-43. NEA/PAC
> The National Education Association believes that educators must constitute a strong political force to secure legislation for the betterment of education and the election of candidates who view education's needs as a national priority. The Association endorses NEA/PAC, the NEA Political Action Committee, and strongly urges educators and friends of education to support it through individual involvement and contributions.[102]

The NEA clearly is committed to continued efforts toward formal, comprehensive negotiations. At least seven resolutions adopted at the 1972 Convention

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* The creation of the Labor Coalition Clearinghouse (NEA, UAW, American Federation of State, County, and Municipal Employees, and other labor unions) in 1975 may signal a major shift in NEA policy toward labor-union alignment.

** HR 1488 proposed such a national act for public employees. The proposed legislation has not been enacted, but the potential for such national legislation continues as a factor in collective bargaining in the public sector. NEA's recently announced decision to recommit $500,000 to lobbying for federal collective bargaining legislation suggests continued prospects for some version of a federal bill.

speak pointedly to the goals of expanded professional negotiations,[103] and the organizational goals for 1972-73 included, among others:

1. To secure by fiscal year 1975-76 negotiation rights and contracts in eight (8) additional states at K-12 through higher education and auxiliary personnel; and

2. To improve by fiscal year 1975-76 the quality of negotiation rights and contracts in 30 states at K-12 through higher education and auxiliary personnel.

In short and in sum, the trend seems clear--expanded negotiations and increased teacher rights in the states already negotiating. The future of the widely discussed NEA-AFT merger is quite unclear. If such merger occurs at all in the near future, it seems likely to be a local or state-level expediency for political power rather than at the national organization level.

One final observation on the future of negotiations. The move toward formal legislated educational accountability, already manifested in 27 states,[104] may stimulate a parallel increase in teacher-board negotiations. Organized teachers generally are not enthusiastic about legislated teacher accountability schemes and, to the extent that the accountability legislation is perceived as a threat, a counter thrust for negotiated protection against such threat seems likely.

Teachers and school administrators must be prepared to participate effectively in the collective bargaining process and to deal rationally with the consequences of collective bargaining. Teachers frequently are called upon to serve on the bargaining teams and the majority of teachers entering the profession are likely to work in districts wherein bargaining occurs. Regardless of one's personal preferences, given the likelihood of professional involvement in either the bargaining process or its outcomes, the teacher's professional self-interest is served by knowledge and informed judgments about the collective bargaining processes. School administrators likewise should expect some direct involvement in the process. Members of the district central administrative staff generally are involved to some extent in negotiations and probably on the management (board) side of the table. Although building-level administrators may have less direct involvement in collective bargaining at the table, they bear primary responsibility for contract implementation and "translation" of the negotiated agreement into day-to-day education. Most grievance machinery requires direct involvement of the building administrator in grievance processing and resolution. Coupled with increasing demands for building-level accountability for educational outcomes, collective bargaining provides building-level administrators with an impressive array of leadership challenges.

Teacher-board bargaining has reshaped educational decision making from unilateral to multilateral dimensions. Management prerogatives of yesterday are now subject to negotiations in many districts and the leadership and followership styles of administrators and teachers have been recast by the process. Teachers can expect even greater responsibility and accountability demands as they move into management decision making through collective bargaining. It is conceivable that school boards may, in the future, seek to move some traditional schoolhouse dilemmas (such as means-ends, resource expansion, assessment and evaluation procedures) into the bargaining arena. From the board's standpoint, it makes sense to assist that the teachers bear proportionate public responsibility along with whatever "benefits" are sought through bargaining.

Our traditional patterns of school government are not sacred; new forms of control and responsibility may be designed by legislation to accommodate to the reality of bargaining. If, for example, collective bargaining along national strategies and through state or national "war plans" effectively destroys local district control over schools, states may revise the school organization patterns to reflect the control reality. It may make sense to operate a state system with far fewer school districts to respond to the demands of collective bargaining, available resources, and the educational needs of the citizens.

Teachers, administrators, and board members alike may need increased knowledge and skills in the areas of school law, finance, staff development, human relations, and the complex relationships embraced in the overly broad but useful term "educational politics." If, indeed, political concerns deal with the allocation of scarce resources, the educational future fashioned by teacher-board negotiations, alienated clients, tight fiscal resources, and expanding expectations for schooling requires politically skillful and educationally wise leaders. The lure of teacher-board negotiations for administrators isn't so much the benefits of engagement, but rather the severe consequences of disengagement. Mature, responsible negotiations can benefit the entire education enterprise. The task for the administrator is to understand, develop, and capitalize on the positive benefits in negotiations and manage the process to the benefit of the schools.

## SUMMARY COMMENTS

The intervention of the law into the schooling process has focused national concern on a broad range of educational issues and problems. The fundamental assumptions and traditional belief structures underlying the form and substances of schooling have come under review and, in many instances, open challenge. This review stimulates further inquiry and opens the way for professional debate with some promise of benefit to both the producers and consumers:

1. If our educational diagnoses are vulnerable to challenge, producers and consumers of schooling must question our reliance on educational prescriptions.

2. We designed educational labels allegedly to facilitate improved schooling for the labelled children; we are now vulnerable to client charges of discriminatory treatment.

3. We professionalized the teaching profession. We upgraded licensing requirements, advanced salaries and benefits, contrived shameless analogues to stimulate "professional" behaviors and self-respect in teachers, and now we seem surprised that teachers resent being treated like hired hands rather than professionals. The problems of professional work within bureaucratic organizations have a special relevance to teacher/board relations.

4. We assigned, and the schools accepted, an incredible (and unrealistic, if not impossibly broad) range of social and intellectual tasks to the schools without much regard to the schools' capacities to perform. Our national surprise, disappointment, and chagrin with schooling shortcomings have turned to litigation. We may be witnessing the emergence of a new witchcraft born of desperation: if schools don't work properly, turn to the courts for major and minor overhauls.

5. We legislated universal schooling and comprehensive common schooling before we sought evidence that all (or most) children could learn from approximately the same lessons. A persuasive body of research, confirmed by common sense, tells us that people learn from interdependent cues, stimuli, and relationships--that education is a pervasive web of one's total life experiences--that the home, the community, and the school must sing from the same hymnbook if schooling is to be effective. We ignore this knowledge and assign legal responsibility to the schools.

6. The law seems to have the capacity to reach schools in ways it cannot speak to parents, the community, and the larger society. We mandate school desegregation but seem impotent to deal with segregated housing and the supporting machinery of racism in the basic dimensions of society. We demand that schools produce social, civil, thinking young adults while we protect uncivil, unsociable adult behavior. The gap between our expectations for in-school behaviors and outside reality is not lost on most young people. They rightly perceive that schooling is a game with baffling, contradictory, and often silly rules.

Judicial and legislative intervention in the schooling process reaches into the fundamental nature of the educational enterprise. The preparation of professional personnel, the teacher/learner relationships, the structures and procedures of schooling are increasingly affected by the courts, the legislatures, and government agencies at the state and federal levels. Teachers and administrators confront the law in their professional roles and need to understand the implications and consequences of legal and legislative mandates on the pupils and themselves.

Professional preparation programs generally do not adequately inform teachers, administrators, and specialists on matters of law; the concentration on pedagogy and academic content overlooks the impact of legislation and the legal consequences impinging on the school's mission. The legal structure of education clearly indicates the fundamental influence of case law, statutes, and agency rulings on the organization, content, and processes of schooling. Schools are, indeed, creatures of law; and to the extent school professionals are not informed of their legal rights, duties, and responsibilities, the schooling process is vulnerable to intervention by the courts. Preservice preparation of educational personnel must include appropriate instruction in significant legal concepts to that the proper relations among the law, teachers, pupils, and schooling can be respected and turned to the benefit of both producers and consumers of schooling.

The concept of due process and its implications in the school context is but one example of the central importance of appropriate training for school personnel. With growing concern for constitutional rights of children and emerging conflict between school processes and individual pupil and parent interest, the need for appropriate understanding of the legal issues becomes more urgent. Discipline problems in the schools are high priority public concerns. The schools are expected to take increasingly central roles in the development of moral and ethical values in children, and with those responsibilities come higher expectations by the public for effective school discipline programs and procedures. In light of recent cases dealing with pupil rights and school duties toward the pupils, it is not clear if the schools can produce the moral and ethical outcomes expected of them. The corporal punishment cases illlustrate the difficult problems created by contradictory expectations of firm discipline and concern for the constitutional rights of children.

The developments in professional accountability and the closely related issues of educational malpractice pose some fundamental problems for the teaching profession. Public demands for increased accountability by school people likely will escalate; the consequences of ineffective schooling are so serious that a society can no longer ignore the problem. The educational malpractice cases illustrate the frustrations of school clients who, when victimized by bad schooling, turn to the courts for relief. Whether bad schooling should be viewed as negligence and liable in damages to the victim is not the real issue; more important, it seems to me, is what the schools do to deliver a reasonably effective educational experience to their clients. It may be that we have undertaken educational tasks far outside our competence and, in our zeal to gain popular support, promised outcomes beyond our capacities to deliver. If the educational malpractice issues do nothing else, they may stimulate a more realistic appraisal of our schoolhouse promises and encourage more honest statements of the nature and probable outcomes of the educational processes.

The impact of collective bargaining on the school enterprise is just now emerging. Beyond the economic consequences, the collective bargaining processes reach into the basic policy-making machinery of schools and raise challenging new problems in the areas of credentialing, curriculum, and a wide array of day-to-day operational concerns in the schools. Teachers and administrators need to understand the dynamics of the collective bargaining process and the consequences of teacher/board conflict resolution. The teacher education programs rarely deal with teacher unions, collective bargaining, grievance machinery, and the other relevant issues in the teacher/board relations area. The realities of the teaching profession today demand that prospective teachers, administrators, and specialists be prepared at the preservice level to deal intelligently with the enormously complex problems in collective bargaining and related labor relations matters in schools.

NOTES

1 See, for example, the School Records Act, enacted by the Illinois legislature as Public Act 79-1108, effective 3/24/1976 (Ill. Rev. Stat., Chap. 122, Secs. 50-1 through 50-10). The Illinois Act roughly parallels the Family Educational Rights and Privacy Act (Sec. 438, Pub. Law 90-247, Title IV, as amended, 88 Stat. 571-574, 20 U.S.C. 1232 g)2. Both the state statute and the federal act provide for the right of parents, and in some instances the students, to inspect and challenge the accuracy of certain academic and personal records of students maintained by public schools. The object of the legislation is not to deny the schools' right to make and keep records but to establish some protection for the pupils and their parents against abuse of their privacy rights.

2 The data used here are taken from The Condition of Education, 1976 edition, a publication of the National Center for Education Statistics, U. S. Government Printing Office, Washington, D.C., 1976.

3 William R. Hazard. Student Teaching and the Law. Special Current Issues Publication No. 5. Washington, D.C.: ERIC Clearinghouse on Teacher Education, January 1976. 15 pps.

4 The concept of the State's acting as parens patriae developed out of the notion that children, unlike adults, required special protections under the law. The courts and the schools alike saw their role as protectors of children and denied the child's most basic, fundamental constitutional protections. As the court noted in the case of Ex parte Crouse, 4 whart. 9 (Sup. Ct. Pa. 1839) at p. 11, "The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so." See also Petition of Ferrier, 103 Ill. 367, 371-373 (1882).

5 Tinker v. Des Moines School Dist. No. 21, 89 S. Ct. 733 (1969).

6 Pickering v. Board of Education, School District 205, 391 U.S. 563 (1968).

7 For a state-by-state analysis of teacher certification requirements, see: Elizabeth Wollner. Requirements for Certification. 40th ed. Chicago: University of Chicago Press, 1975. 231 pp.

8 See: Phyllis Hawthorne. Legislation by the States: Accountability and Assessment in Education. Report No. 2, Cooperative Accountability Project, Denver, Colo., August 1973. p. vii.

9 See, for example: Stoer v. Ocklawaka River Farms Co., 223 Ala. 690, 138 So. 270 (1931).

10 Munn v. Illinois, 94 U.S. 113, 24 L. ed. 77 (1876); Truax v. Corrigan, 42 S. Ct. 124, 257 U.S. 312 (1921); Rosenblum v. Rosenblum, 42 N.Y.S. 2d 626, 181 Misc. 78 (1943).

11 Tinker v. Des Moines School Dist., 89 S. Ct. 733 (1969).

12 Goss v. Lopez, 419 U.S. 565 (1975).

13 Hannah v. Larche, 363 U.S. 420 (1960) at 442.

14 See, for example: Cleveland Bd. of Ed. v. LaFleur, 94 S. Ct. 791 (1974), wherein the Supreme Court invalidated rules requiring pregnant teachers to take maternity leave at a specified time prior to expected delivery. The Court held that the arbitrary cutoff dates in the mandatory rules bore no reasonable relationship to the valid state interest in preserving continuity of instruction and thereby violated the teacher's protected right of substantive due process.

15 Merle McDung. "The Problem of the Due Process Exclusion," Journal of Law-Education 3 (4): 496; October 1974. Also see Lovelace v. Leechburg Area School District, 310 F. Supp. 579 (W.D. Pa. 1970), wherein the Court found the school's exclusion of a pupil for wearing a "barely perceptible" moustache to be "arbitrary" in violation of due process without finding any constitutional right to wear a moustache and with a finding that the school's rule aginst wearing moustaches was reasonable.

16 St. Ann v. Palisi, 495 F. 2d 423 (5th Circ. 1974).

17 Ibid., 429.

18 Brown v. Board of Education, 347 U.S. 483 (1954).

19 West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

20 Brown, op. cit.

21 San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

22 Homer v. Richmond, 292 F. 2d 719 (D.C. Cir. 1961) at 722.

23 262 U.S. 390 (1923) at 399.

24 268 U.S. 510 (1925).

25 387 U.S. 1 (1967).

26 387 U.S. 1 at 19.20.

27 Foreword, in: M.B. Virtue. Study of the Basic Structure for Children's Services in Michigan. Ann Arbor, Mich.: American Judicative Society for the James Foster Foundation, 1953. p. x.

28 393 U.S. 503 (1969) at 509.

29 Ibid., at 511.

30 Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

31 Ibid., at 313.

32 Ibid., at 584.

33 Ibid., at 591-93.

34 420 U.S. 308 (1975).

35 42 U.S.C. sec. 1983.

36 420 U.S. 308 (1975) at 322.

37 Ibid., at 329.

38 Scheuer v. Rhodes, 416 U.S. 232 (1974) at 247-248. Scheuer examined the standard of immunity for the Governor of Ohio in his decision to call out the National Guard at the Kent State incident.

39 419 U.S. 565 (1975).

40 Ohio Revised Code, sec. 3313.66.

41 419 U.S. 565 (1975) at 583-84.

42 Ibid., at 583.

43 For a brief review of the relationships between law and schooling in a framework of social change, see: Education and Urban Society, Vol. 8, No. 3, May 1976, and particularly William R. Hazard, "Schooling and the Law: Reflections on Social Change," pp. 307-32 in that issue.

44 388 F. Supp. 543 (S. D. Ohio 1975).

45 Ibid., at 546.

46 395 F. Supp. 294 (M.D.N.C. 1975), affirmed 96 S. Ct. 210 (1975).

47 525 F. 2d 909 (1976).

48 North Carolina General Statutes, Sec. 115-146.

49 Meyer v. Nebraska, 262 U.S. 390 (1923), struck down a state law forbidding instruction in the German language at the common school level in part because it arbitrarily interfered with the right of parents to procure such instruction for their children.

50 Pierce v. Society of Sisters, 268 U.S. 510 (1925), struck down a state public school mandatory attendance law because it unreasonably interfered with the right of parents and guardians to direct the upbringing and education of children under their control.

51 Prince v. Massachusetts, 321 U.S. 158 (1944), interpreted the Meyer and Pierce decisions as recognizing that the "custody, care and nurture of the child reside first in the parents."

52 395 F. Supp. 294 (M.D.N.C. 1975) at 300.

53 Ibid., at 302-303.

54 525 F. 2d 909 (1976) at 915.

55 Ibid., at 917.

56 Ibid., at 919.

57 Naomi F. Chase. "Corporal Punishment in the Schools," Wall Street Journal, November 11, 1975. p. 20.

58 Although the literature on educational malpractice is scant, a few pieces have begun the examination of some issues. See, for example: David Abel. "Can a Student Sue the Schools for Educational Malpractice?" Harvard Educational Review 44 (4): 416-36; November 1974; Belle Lind Gordon. "Tort Liability for Failure to Educate," Loyola University of Chicago Law Journal 6 (2): 462-81; Spring 1975; and William R. Hazard. "Educational Malpractice: Some Issues," Law in American Society Journal 5 (1): 2-8; February 1976.

59 The NEA Research division surveyed the 7,122 school systems enrolling 1000 or more pupils during the 1970-71 school year. Of these, 3,522 returned the survey questionnaire and validated negotiation with a copy of an agreement. Of the 3,522 classroom teacher agreements returned, 43.4 per cent (1,529) were comprehensive (written contracts recognizing a bargaining representative agency with negotiation procedures defined). These 1,529 comprehensive agreements covered 53.5 per cent (654,992) of all teachers represented in school systems with negotiation agreements. See Negotiation Research Digest, November 1971, pp. 20-38.

60 Allan M. West. "Professional Negotiations or Collective Bargaining?" National Elementary Principal 42: 20-25; February 1963.

61 Oscar A. Weil. "Collective Bargaining or 'Professional Negotiation,'" Cook County Educational Digest 31 (1): 12; May 1968.

62 Ibid.

63 For an interesting and insightful analysis of the causes of militancy (and inferentially, the genesis of negotiations), see: Patrick W. Carlton. "Social and Attitudinal Correlates of Collective Negotiations in Education," The ISR Journal 1 (1); 29-32; Winter 1969. Therein, Carlton examines six factors related to teacher militancy: (a) competition for scarce public resources, (b) the organizational power struggle between the AFT and the NEA, (c) the schools' emerging political clout as a "growth industry," (d) the respectability of social protest, (e) the increased size and impersonality of the educational bureaucracy, and (f) decreased identity by teachers with the communities in which they teach.

64 Wesley A. Wildman. "What's Negotiable?" American School Board Journal, 155 (5): 8; November 1967.

65 Section 111.70 of 1959 Wisconsin Statutes.

66 Carl Joachim Friedrich et al. Problems of the American Public Service. New York: McGraw-Hill Book Co., 1935. p. 227.

67 William R. Hazard. "Collective Bargaining in Education: The Anatomy of a Problem," Labor Law Journal, July 1967, pp. 412-13.

68 Ibid., p. 414. Professional negotiations became official NEA policy at the Denver Convention in July 1962. The policy was defined in the official literature as ". . . a set of procedures, written and officially adopted by the local association and the school board, which provides an orderly method . . . to negotiate, through professional channels, on matters of mutual concern, to reach agreement on these matters, and to establish educational channels for mediation and appeal in the event of impasse." See: National Education Association. Guidelines for Professional Negotiation. 1965 rev. ed. Washington, D.C.: Office of Professional Development and Welfare, NEA, p. 1. The first formal adoption of a professional negotiation agreement by a school district occurred at Pasadena, Calif., on August 3, 1962. See: Ronald O. Daly. "Professional Negotiation," Journal of the National Education Association 54: 30-31; May 1965.

69 See: Wesley A. Wildman. "Collective Action by Public School Teachers," Industrial and Labor Relations Review 18: 12-13, October 1964. For an account of the circumstances and procedures leading to the application of sanctions to an entire state school system, see: National Education Association. Utah: A State-Wide Study of School Conditions. Washington, D.C.: National Commission on Professional Rights and Responsibilities, NEA, 1964.

70 Continuing resolution C-48 provides for the imposition of sanctions when other means for preventing unethical or arbitrary policies or practices that have a deleterious effect on the school have been exhausted. Continuing resolution C-49 provides for teacher strikes under some circumstances. See National Education Association. Resolutions and Other Actions. Atlantic City, N.J., July 1972, pp. 23-24.

71 Carlton, op. cit., pp. 33-35.

72 Ibid., pp. 33-34.

73 Wildman warned of the consequences of the tendency to state-level involvement in teacher-board disputes as early as 1965. See: Wesley A. Wildman. "Teacher Collective Action in the U.S.: 1965." Unpublished paper (mimeographed).

74 See, for example: William R. Hazard. "Semantic Gymnastics," American School Board Journal 155 (4): October 1967; 14-20; and Michael H. Moskow. "Teacher Organizations: An Analysis of the Issues," Teachers College Record, Vol. 66, October 1964.

75 Wesley A. Wildman. "What's Negotiable?" American School Board Journal 155 (5): 7; November 1967.

76 Some commentators allege that the objective of teacher-board negotiations is control over the entire education enterprise. See, for example: Roy J. O'Neil. "Who Shall Govern?" Illinois School Board Journal 40 (1): 12-13; January-February 1972; Robert E. Doherty. "Public Interest at Stake," American School Board Journal 155 (4): 11-14; October 1967; Roy J. O'Neil, "Battle for the Board," Illinois School Board Journal 40, (1): 26; January-February 1972; and "Pursuit of Power," Time, September 22, 1967, reprinted in Illinois School Board Journal, September-October 1967, pp. 8 ff.

77 Carlton, op. cit., p. 34.

78 Some pressures are mounting for multilateral decision making in the school context. The public interest and, more specifically, the interests of pupils and their parents may require some additional seats at the bargaining table. Havemann described a most interesting account of parents' participation in a school board meeting devoted to strategies for teacher-board negotiations. See Chicago Sun-Times, September 10, 1972, pp. 3 ff.; and Robert E. Doherty. "Public Interest at Stake," American School Board Journal 155 (4): 11-14; October 1967. For a detailed account of the 1968 New York City teachers and supervisory personnel strike and the emergent influence of parents, see: Melvin Urofsky, ed. Why Teachers Strike: Teachers' Rights and Community Control. Garden City, N.Y.: Anchor Books, Doubleday and Co., 1970.

79 The right of teachers to organize is generally recognized in the United States. Despite some early decisions to the contrary (for example, Fursman v. The City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917), wherein the Illinois Supreme Court upheld a rule of the Chicago Board of Education prohibiting teacher membership in labor unions or a federation or association of trade unions on pain of dismissal), the current interpretations of the First, Fifth, and Fourteenth Amendments to the federal Constitution clearly support the teachers' right to organize. A landmark case on the issues in teacher-board negotiations is Norwalk Teachers' Association v. Board of Education of the City of Norwalk, 138 Conn. 269 (1951).

80 Weil, op. cit.

81 See Carlton, loc. cit.

82 NEA, Negotiation Research Digest, November 1971, p. 22.

83 Wesley A. Wildman. "What's Negotiable?" American School Board Journal 155 (5): 8; November 1967. Moskow's "model" teacher-board negotiations bill is of some historical interest. In 1965 he proposed that such model legislation should provide at least for the following: (a) exclusive recognition of a bargaining agency, (b) unit of representation should be determined on a district-by-district basis, (c) scope of negotiations in general terms to avoid the unanticipated inclusion of undesirable or the exclusion of desirable items, (d) the agreement should be written, (e) prohibited practices to prevent abuses of power granted to exclusive representatives, (f) impasse procedures, and (g) administration of the statute by an impartial agency. See: Michael Moskow. "Recent Legislation Affecting Collective Negotiations for Teachers," Phi Delta Kappan, November 1965, p. 140.

84 Connecticut, Delaware, Idaho, Kansas, Nebraska, and Vermont.

85 Alaska, California, Florida, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington, and Wisconsin.

86 Chicago Division I.E.A. v. Board of Education, 76 Ill. App. 2d, 456 (1966).

87 Ronald R. Booth and Milton Carlson. Collective Bargaining in Illinois Schools, 1975-76. Springfield: Illinois Association of School Boards, June 1976. p. 11.

88 See: James L. Fletcher. The Judicial and Legislative History of Public School Employee Collective Bargaining In Illinois: 1921-1971. Unpublished doctoral dissertation, Northwestern University, 1971, particularly Chapter 4, which provides comprehensive historical data on Illinois legislation related to the teacher-board negotiations.

89 Report No. 78; an update of Research Brief, Vol. 3, No. 4, published in January 1975. Denver, Colo.: Education Commission of the States, January 1976. 49 pp.

90 U.S. Stat. at Large XLVII, 70.

91 49 U.S. Stat., 449.

92 Act of June 23, 1947, Public Law 101, 80th Congress, Chap. 120, 1st session.

93 See, for instance, Molitar v. Kaneland Comm. Unit District, 18 Ill. 2d 11 (1959), and Becker v. Beaudoin, 106 R.I. 562, 261 A. 2d 896 (1970).

94 National Education Association. Teacher Strikes, Work Stoppages and Interruptions of Service, 1971-72. NEA Research Memo, 1972-18, October 1972; p. 1.

95 School Committee of the Town of Westerly v. Westerly Teachers Association, Supreme Court of Rhode Island, no. 1874-M.P. (1973). See also The Armstrong Education Association v. The Armstrong School District, Commonwealth Ct. of Pa., no. 793 C.D. 1971, May 17, 1972.

96 Ibid., Westerly.

97 Hawaii Act 171 of 1970, as amended, 1971, Sec. 12.

98 California Education Code, Sec. 13080 (West Suppl. 1972).

99 Public Employment Relations Stat., Hawaii Rev. Stats., Sec. 89-1 (1970), as amended, Sec. 89-1 (1971).

100 1968 Mo. Atty. Gen. Report.

101 The January-February 1972 issue of the Illinois School Board Journal was devoted to the "causes and consequences" of collective negotiations, particularly in Illinois. Of special interest on the motivations and machinations of the organized teachers, and perceived by some observers, is the article by Roy J. O'Neil, "The Rise of Teacher Unionism," at pp. 6-8 of the issue.

102 National Education Association. Resolutions and Other Actions. Atlantic City, N.J., July 1972, p. 36.

103 Ibid., pp. 17-19, 23, 24, 30 (Resolutions C-28, C-32, C-36, C-46, C-48, C-49, and 72-14).

104 For an analysis of the development of state plans for educational accountability, see: William R. Hazard. Accountability in Education, a report to the Illinois Commission on Urban Education, Chicago, Illinois, December 1972. 62 pps. (mimeographed); and Phyllis Hawthorne. "Legislation by the States: Accountability and Assessment in Education." Report No. 2, Cooperative Accountability Project, Denver, Colo., August 1973. p. vii.

II

# STATE INTEREST, CERTIFICATION, AND TEACHER EDUCATION PROGRAM APPROVAL

Lawrence D. Freeman

## PREFACE

This paper was prepared at the invitation of the ERIC Clearinghouse on Teacher Education. The views presented are those of the author exclusively and in no way are to be taken as representing the positions of the Illinois Office of Education, Illinois State Board of Education, or Illinois State Teacher Certification Board.

The author is, and urges readers to be, aware that this paper is explorative, not definitive in character. I have drawn heavily at times on my experiences as an observer of teacher education and administrator and have granted my Scandinavian Midwestern subliminal tendencies as much validity as some of the available literature. Thorough searches of the various literatures were impossible given the shortness of preparation time; documentation is more illustrative than definitive. Credit for some ideas probably is not given where merited. Some topics had to be discussed in the absence of any literature.

The author wishes to acknowledge the assistance of Susan K. Bentz, Mary Craig, David Daniel, William B. Gillies, III, Bette Marshall, Jodi Martinez-Martin, and Barry Weiss; all of these individuals assisted in clarifying what were at the beginning of this paper oftentimes vague and unclear concepts. Paul Olson and William Hazard offered helpful criticism. My thanks to Diane Babich for typing the manuscript. Special thanks go to my wife, Rosie, for offering her usual cogent criticism and to both her and my children for tolerating frequent changes in their summer schedules to permit completion of this paper.

Larry Freeman
Illinois Office of Education
Springfield, Illinois

INTRODUCTION

Certification of educational personnel has its legal authority in actions of a state legislature, its implementation in an appropriate--usually a state--agency, and its ultimate expression in the capacity of individuals to function as teachers in schools, a capacity developed in part during a period of preparation at an institution of higher education. Theoretically, certification serves to protect identifiable state interests; though practically, discussions of certification rarely identify and describe those interests. The state interests in need of protection usually are assumed, with only brief notice taken of the need to protect the public; and, in any event, statutes require it.[1] Yet defense of certification requires examination of the relationship between the system of certification and state interest.

Recent criticism of teacher certification systems has focused on this relationship. Koerner, for instance, prefers the elimination of certification, arguing that the benefits of doing so would outweigh almost certain abuses. Drummond asserts that our society has pursued credentialism too far and argues not for elimination of certification but for a reduction in the number of roles requiring certification.[2] Rebell concludes his study of New York State certification by posing a series of questions focusing on the relationship between state interests and certification:

> If teacher training institutions cannot assure demonstrable competency in their graduates, why continue their monopoly over access to the profession? If teacher credentialling laws are presently incapable of guaranteeing quality personnel, why keep them on the books? If present practices unreasonably limit the supply of high caliber instructors, why not remove the barriers and widen the pool of available talent? If performance standards and performance evaluation can best be accomplished at the local level, why continue a regional or statewide orientation?[3]

The Commission on Certification of the University Council for Educational Administration observed:

> With respect to legal and quasi-legal constraints . . . we do not have adequate evidence to justify, particularly with reference to performance criteria, typical existing state certification requirements, university division standards, or preparatory programs in educational administration.[4]

The research literature, state statutes, or judicial opinions provide virtually no assistance in deciphering the relationship between state interests and certification systems. Mitchell Wendell, in a speech to members of the National Association of State Directors of Teacher Education and Certification, summarized the situation succinctly:

> It is not enough to set up hurdles that disqualify some significant portion of the population or a substantial percentage of applicants. The evidence required of applicants

> and on the basis of which their fitness is judged must actually be probative of their ability to protect the identified public interest which justifies the state intervention via licensure. . . .
>
> Usually the certification agency and its parent education department do not clearly spell out the reasons for the necessity of following an approved program or its equivalent in order to demonstrate entitlement to certificates. . . .
>
> In fact, anyone set on mounting a legal challenge . . . could offer evidence that the preparatory requirements for certification demanded by a given jurisdiction are not inevitably necessary.[5]

John C. Hogan echoes Wendell's observation when commenting on the implications of the doctrine developed in Serrano v. Priest:

> . . . it might as well be anticipated now, because it can be reasonably and logically expected under the California doctrine of Serrano v. Priest, that the state will eventually be required to establish "the compelling State purpose" that necessitates the requirement of the teaching credential itself.[6]

This daisy-chain of quotations was not woven to suggest that a system of certification be eliminated, but to indicate that some perceptive and articulate observers have challenged not only whether certification erects arbitrary and discrimatory barriers to the education professions, but whether certification as we know it is the preferable means of securing and promoting the state's undoubted interest in the education of its young. This perspective becomes even more crucial if administrative machinery allegedly designed to promote the state interest simultaneously curtails individual rights apparently guaranteed by the Fifth and Fourteenth Amendments.

## STATE INTEREST IN CERTIFICATION

One of the most popular formulations concerning the function of certification is that "the profession (should) develop workable ways of insuring that only the ablest teach."[7] Scrutiny of the phrase "the ablest" immediately reveals that it functions much the same way as the Boy Scout motto, "Be Prepared," or an advertisement claiming "one-third off." This phrase has the features of propaganda or sloganeering. One may well ask of the Boy Scout motto, prepared for what?--every possible contingency? One may ask of the advertisement, one-third off of what? "Ablest" to do what? When discussing preferences for characteristics of school personnel, terms such as "competent," "only the ablest," and "most capable" are so general as to be virtually meaningless. They might be said to be "unlocated," without context.

It appears impossible, to paraphrase Whitehead, to fuse the large generality of "ablest" with insistent particularity. There is no assurance that those asserting that only the ablest should teach would know if they encountered one of the ablest. This potential failure is underscored by recent research which suggests that effectiveness in teaching is probably found by examining the individual person teaching specific children in a specific environment.[8] To assert a theory of state interest on the basis of this proposition is to run the simultaneous risks of confusing, in Quixotian fashion, fantasy and reality, and prematurely conferring the attribute of competence on the profession as a whole rather than on individuals.

John Hopkins provides a more defensible position when he asserts a relationship between state or public interests and a system of certification:

> . . . the right and responsibility of the State to certify teachers is a legitimate, moral, and rational use of the political power of the State, only to the extent that teacher certification protects and promotes some demonstrably legitimate public interest of the people for whose welfare and benefit State accredited schools are established. Statutes, policies, and procedures which together constitute teacher certification are not authorized in order to protect special private interests, such as the desires of aspiring teachers for some official State acceptance of previous training and experience. Just as the State does not examine and license physicians in order to assist the graduate of a medical school in pursuing his special private interest of setting up a practice and making money, so the proper purpose of State procedures for teacher certification is not to assist the graduate of a school of education in pursuing his legitimate private goal of getting a job.[9]

In a large sense the clientele of education is the "people." By people, I do not mean the "State." Consider the distinction made by the framers of the Ninth and Tenth Amendments. The Ninth Amendment provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment reserves powers "to the States and the people." While the meaning of the term "people" in these amendments is not clear and precise, it appears to embrace a notion of collectivity, that as individuals and groups the people are to be protected from certain forms of federal interference or can rightfully act in some cases without authority of the government. The "people" as the clientele of education was more explicitly recognized by Congress in the original bill creating the Federal Department of Education (1867). Congress rejected language which would have enforced "education . . . upon the population of all such states as shall fall below a standard to be established by Congress." Instead Congress employed language making the department a service to the "people of the United States." While this decision may be seen by some as little more than employing high-blown rhetoric to mask a pragmatic political decision, it is my view that Congress was attempting to recognize the "traditions and (collective) conscience of our people."

This discussion of the "people" as the clientele of education is premised on the assumption that while education is indisputably a matter affecting individuals, it is also a social and political process that seeks to ensure survival of the present and future generations, a process that recognizes the fact that civilization in any of its forms is only one generation from extinction. It is then an undoubted interest of the "people" to ensure the provision of education, which is reflected in the provisions of state constitutions requiring the establishment of common schools.

The character of this state interest can be generally formulated as assuring that individuals move from childhood to adulthood and acquire the capacity to function effectively and productively in social, economic, and political processes, thereby achieving self-fulfillment and contributing to the common good. Education becomes one aspect of child rearing and parenting. The state interest finds more specific expression in the various school codes which mandate various areas of instruction. These instructional mandates are somewhat curious because, for the most part, attention is focused on what might be regarded not as "individual survival skills" but on "group survival." Citizenship education is mandated by virtually every state, and in Illinois, "every public school teacher shall teach the pupils honesty, kindness, justice, and moral courage for the purpose of lessening crime and raising the standard of good citizenship." Driver education, conservation education, instruction regarding the effects of alcohol are fairly clearly intended to benefit the public in general. Additionally, several states have acted to require that the history of the United States as taught in the public schools include study of the role and contributions of various ethnic groups. The necessity of acquiring "minimal skills" appears to be assumed.

The state interest in certification is twofold: (a) to ensure that those delegated authority to act on behalf of the state in the socialization of the young have the necessary perspectives, experience, and skill to participate properly in the socializing of the young; and (b) to ensure that those delegated authority to act in the child's interest as declared by the state can provide the necessary instruction in "survival" skills.

## INDIVIDUAL INTERESTS

But what of individual interests in this matter?[10] State interests cannot long be pursued without someone claiming an infringement of individual interests. Competition between state and individual interests must be anticipated.

Once the state has acted to compel children to attend schools, or perhaps even if the state simply undertakes to provide public education, children immediately assume some rights. These can be summarized as follows:

1. In the context of the schools as a custodial institution, the health and safety of the children must be protected, and they must be protected from physical and personal abuse.

2. Under state constitutional guarantees of equal application of the laws, children have an interest in the equality of the educational opportunities afforded them.

The first kind of protection needs no further discussion; its necessity is obvious, if only in that no theory can be constructed to suggest that the protection is not obligatory.

The right to, not a mere interest in, equal protection under the law requires more extensive discussion. The language of Brown v. Board of Education is now famous as it sets forth the notion that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[11] A number of cases elaborating the necessity for state-sponsored education to be available on equal terms can be cited. For example, Serrano v. Priest addresses the question of neutrality or equality in the financing of education. Two other cases, Pennsylvania Association for Retarded Children v. Pennsylvania and Mills v. Board of Education, establish the necessity for making public education available to children who have been judged incapable of profiting from regular classroom instruction.[12]

Application of the constitutional provisions regarding equal protection under the law has in one case been extended to teacher certification. In Hunnicutt v. Burge, 29 white taxpayers alleged that Fort Valley State College, an all black institution, was academically inferior when compared to other colleges in the state system. Finding for the plaintiffs and ordering the Regents to develop a plan for improving the academic quality of the institution, the court observed:

> The secondary beneficiaries would be the children who now and hereafter are enrolled in the public schools in the state. Graduation from Fort Valley State College with an education degree entitles the graduate to a certificate from the Board of Education of this state, which in effect says, "You are a teacher and qualified to teach in the public schools of Georgia. . . ." If the children--Negro and White--of this state are to receive the quality of public education they need and are constitutionally entitled to, they must be taught by teachers who are qualified, not from possessing a piece of paper called a "teacher's certificate," but from possessing a good education and thereby knowing something to teach. To adequately educate and thus license teachers who are not qualified is to deny equal protection of the laws to plaintiffs and all students of Georgia's public schools.[13]

This observation suggests that it is incumbent upon the state to assure that educational personnel are equally qualified, and not merely because the person has met some course requirements. The notion of equality, as we have seen it develop in the context of education, seems however to be inapplicable in the area of teacher certification. A mathematical conception of equality applied to certification runs headlong into the reality of differences among students, communities, and educational personnel. A monolingual teacher, capable of speaking and reading English, is obviously not fulfilling commonsense notions of equality if the children in the classroom are also monolingual with Spanish or Lakota as their native tongue. David Hawkins, in his

essay "Human Nature and the Scope of Education," suggests a more sophisticated analogy that may assist in responding to the notion of equality among educational personnel. His analogy is that of "commensurability." Since he acknowledges that all human beings are incommensurable, always different, never identical, he argues:

> . . . the meaning of incommensurability is that diverse children can attain to a common culture--a common world of meanings and skills, of intellectual tools, moral commitments, and aesthetic involvements. Individual development can complement individual differences, but only through a matching diversity of learning styles and strategies. Children can learn equally, in general, only as they learn differently. The more constraints there are toward single-track preprogrammed instruction, the more predictably will the many dimensions of individual variety--congenitally and individually evoked--express themselves as a large rank-order variance in learning.[14]

Hawkins' argument implies that as in learning, children learn only as they learn differently, so in teaching, children learn only as they are taught differently.

In some measure this reality has been recognized in the development of certification and employment systems for educational personnel. Special education certification and bilingual certification are two obvious examples, and the granting of autonomy to local districts for actual hiring enables the school district at least theoretically to select the diverse educational personnel to respond to the needs of its children. But establishment of the categories for bilingual and special education may not be sufficient if the state is to discharge its burden "to assure that the educational program provided each child is appropriate to his needs." In a case in New York, a court upheld the New York City Board of Education's creation of a new kind of position and permitted hiring applicants who did not appear on its eligibility lists for similar positions (until a new examination could be prepared). The court noted:

> If an educational problem be concerned with a failure to reach an ethnic group, it can scarcely be imagined that the Board of Education, in creating a school position to deal with this problem, would not require special experience with the ethnic groups for essential qualifications.[15]

We might then pose as a central question whether the certification of teachers must in some manner recognize differential individual and community needs in evolving certification standards.

## CERTIFICATION STANDARDS

### DELEGATION OF AUTHORITY

At present, the setting of specific and detailed standards for certification is delegated by legislatures to state boards of education, commissions on teacher certification, or a state superintendent. In New York, for instance, the Commissioner is granted authority to "prescribe, subject to the approval of the regents, regulations governing the examination and certification of teachers employed in the public schools of the state" (Ed. Law, Sec. 3004). Illinois has delegated a similar authority to the Superintendent and the State Board of Education to develop rules and regulations in consultation with the State Teacher Certification Board. While there is diversity in the officials to whom the authority is delegated, the legislature rarely sets forth in detail the specific qualification for teachers. Legislatures tend to acknowledge a requirement of a bachelor's degree and may indicate variously the number of hours needed for the degree or the number of hours of "general education" and "professional education." Within this general framework, officials of commissions or boards promulgate more detailed criteria for certification.[16]

### HIGHER EDUCATION CATEGORIES

Whoever undertakes establishment of criteria for teacher certification faces an inordinately complicated task. I have, for instance, sketched out earlier in this discussion some of the state and individual interests that should be served by the certification of educational personnel. Against this background it is striking that the delegated authority is typically used to establish "course and credit hour" requirements. Requirements, expressed in course or credit hour formats, have ranged across a considerable number of areas: history and philosophy of education, teaching methods, U.S. history, human relations, reading, and so on. Within certificate categories, the requirements may be even more specific: childhood nutrition for an early childhood certificate, children's literature for the elementary certificate, school law and finance for the administrative certificate.

In general, the development of certification requirements appears to have been dictated, to a large extent, by the intuitive notions of "what a teacher or guidance counselor needs to know" and then using available higher education categories to express the requirement. One might well make out a case that an elementary teacher should have a general knowledge of mathematics. As expressed in rules and regulations, this intuitive judgment becomes "four hours of mathematics." This instance can be replicated almost ad infinitum by citing existing rules and regulations of the various states. Even if there is an assumption that the required work is indispensable in the preparation of teachers, the meaning of this kind of regulation is extremely abstract; its relationship to teaching elementary students is not immediately evident.

This brief discussion raises two issues that deserve our attention: (a) the relationship between such requirements as formulated and the various interests to be protected by certification; and (b) the soundness of using higher education categories for expressing the requirements. The first issue focuses on the process of developing, on the basis of a statute without much legislative direction, a set of requirements that can legitimately be said to relate to the protection of the kinds of state and individual interests we have discussed. The second issue focuses on how these requirements might be formulated so as to enable administrative implementation of and give meaning to the requirements.

The development of rules and regulations, at present, must proceed within the context of legislatively established frameworks. Within these frameworks, however, considerable discretion is possible. Let us assume hypothetically that a certification statute requires 120 credit hours and specifies that 34 must be in general education and 20 in professional education. Immediately the question arises as to what constitutes general education and, further, the relationships between it and the state and individual interests we have identified.

"General education" might arguably be related to the state interests: (a) to socialize the child, and (b) to provide the child opportunity to acquire "survival skills." For it appears that the prospective teacher would acquire understanding and knowledge, albeit culturally parochial, of "intellectual and spiritual traditions" and perhaps would acquire the major intellectua tools available to twentieth century man to pass on to students. Conceptually, then, general education can be related to the identified state and individual interests. We would consequently expect that requirements evolving in this area would employ a scheme which recognized salient aspects of cultural heritages and histories, political and economic theories, scientific and mathematical paradigms, with perhaps some attention along the way to the tools of "philosophy."

Similarly a case might be made for what we know as "professional education." Whatever "professional education" as an abstract idea may be, educational personnel need to have a clear and comprehensive understanding of their role in carrying out state interests in a context potentially complicated by legitimate parental interests. An understanding of what adults in an authority role may do to a child which serves or disserves state, parental, and child interests is necessary. Again, in order to be responsive to these interests, educational personnel need the capacity to respond to a range of learning and cultural styles, and to do so with sensitivity to cultural and community mores and traditions. Conceptualized in this fashion, "professional education" appears to have a reasonable relationship to the interests we have identified. And an argument in favor of a "major or a teaching field" might be constructed along the same lines, particularly if the "teaching field" is mandated by the legislature.

We have then arrived at a position which apparently enables us to say with some confidence that a case can be made for the trinity of teacher education--general education, professional education, and a teaching specialization. But we have yet to consider how these general notions can be meaningfully formulated as a set of rules and regulations. Habitually, and perhaps understandably, the typical formulation falls into a pattern in which

a college or university department or "division" is named and a certain number of hours prescribed; this is particularly true in the area of general education and in a teaching specialization. Thus, a requirement will read: "Mathematics . . . 6 hours," "English (Language Arts) . . . 9 hours." Eloquent arguments can be made and have been made for the necessity for a teacher in virtually any field to have an understanding of the discipline of mathematics. One does not have to argue ferociously to show its relevance to music, to the teaching of deductive logic in the English classroom, to the teaching of social studies. One may have to work harder to show relevance for the humanities, but such relevance can putatively be shown. But taxonomies of knowledge other than those in the typical university or college departmental or divisional structures can be envisioned and may manifest a more direct relationship to the role potentially assumed by our hypothetical teacher or administrator. Present departmental structures and their identification with so-called "disciplines" do not, upon scrutiny, appear to have developed out of a logically formulated taxonomy of the knowledge available to and important to twentieth century man; rather like all human social institutions they have developed in response to specific historical forces coming into play at specific times. Wholesale reliance on higher education categories, therefore, runs the risk of undermining the relationships we have established in our preceding discussion. General education, departmentally or divisionally understood, may not lead to the outcomes anticipated; the same may be true for professional education. In blunt terms, the aggregate of departmentally offered courses may not--indeed is unlikely to--serve the identified state and individual interests.

The problem is compounded by the inclusion of the notion of credit hours in the typically formulated requirements. The credit hour, whose historical origin is not definitively documented, appears to have been created as a means of managing the elective system efficiently. A paper developed by the Committee on the Efficient College sponsored by the Association of American Colleges contains, for the first time to my knowledge, a formula for calculating cost per student hour at the college level. The reason for inventing this device is as follows:

> "A study of college efficiency very soon suggests the need for some unit of measurement by use of which college costs may be compared. For this purpose the student hour is the best unit to use." At the time of its invention, the "cost per student hour" formula was viewed as necessary because of the adoption of the elective system. . . . The elective system necessitated it because choices had to be made between various electives to be offered, and since the elective system generally declared everything equal, cost became a dominant criterion.[17]

Though Veblen is not addressing directly the credit hour system as we know it, his commentary on similar systems used in the early 1900s sharply focuses the problem under consideration:

> Each unit of work required or rather credit allowed in this mechanically drawn scheme of tasks is equivalent of all the other units; otherwise, a comprehensive system of scholastic accountancy will not be practicable, and injustices and irritations will result both among the pupils and the school masters. For the greater facility and accuracy in conducting this scholastic accountancy, as well as with a view of the greater impressiveness of the published schedule of courses offered, these mechanical units of academic bullion are increased in number and decreased in weight and volume; until the parcelment and mechanical balance of units reaches a point not easily credible to any outsider who might naively consider the requirements of scholarship to be an imperative factor in academic administration.[18]

In short, the credit hour is an abstract notion that resists concretizing, a notion that has in its origin, and in its continued use, more emphasis on usefulness as an intra-institutional management device than as a certification that any learning or education has taken place. It simply is not designed to be used reliably in attesting to relationships between state interests and preparation of educational personnel.

The point is that the system of management that has been developed to conduct the enterprise of higher education is an institutionally specific system. Because it is institutionally specific, the departmental and credit hour systems have precious few meaningful relationships to other sectors of society.

But one may object that departments and credit hours, whatever their meaning and relevance to purposes such as certification, not only exist but are increasingly relied upon for accounting purposes in higher education. Major developments in higher education management systems rely more and more on the credit hour as the unit of cost; and whatever its failings, it is the only device enabling comparisons between and among departments, colleges in the same university, and institutions. And it does offer the kind of standardization needed in the certification process. Besides, without credit hours, how would we know what constitutes the bachelor's degree established as a basic requirement by legislatures?

Yet the apparent effects of the current higher education management system are (a) to encourage efforts to "bring order to" rather than "find the order in" education; and (b) to encourage maintenance of the status quo rather than the exploration of new educational formats. The authors of Educating a Profession comment on the difficulties in bringing the "disciplines" into a meaningful relationship to the education of school personnel; difficulties created, or at least exacerbated, by the management system we have described:

> As conventionally taught, the disciplines are vulnerable to four types of criticism. First, the disciplines are too often taught as separate and rigorous bodies of knowledge, each with its own self-sealed boundaries, established

> research standards, and exclusionary initiation rites. Instead of emphasizing the concepts, facts, values, and procedures which might overlap with other disciplines, the disciplinarian is likely to call attention to the highly idiosyncratic type of inquiry which exists within each specialized discipline. . . .
>
> Second, the criticism of the undergirding disciplines usually made by disgruntled students is that these studies are too theoretical and divorced from the real world of professional practice.[19]

On balance, the tendency to rely on conventional departmental structures and credit hour management systems may be misdirected. If one poses the question, "How is the preparation of school personnel possible?" establishing department and credit hour requirements does not seem to constitute a very significant and serious response. Ideally, one would assume that such requirements would be demonstrably job-related and based on some empirically established theories concerning career development in teaching as well as, of course, a theory of state and individual interest. In reality, however, it appears that certification requirements have instead been developed with an eye to bringing order to--standardizing--the certification of school personnel, rather than "finding the order in" the act of certificating.

## ASSESSING INDIVIDUALS: TRANSCRIPT EVALUATION

At issue in this discussion is the difficulty of establishing a means of evaluating and documenting the totality of an individual's behavior as a prospective teacher, and not merely bits and pieces of it. Even if we knew what a credit hour meant and were assured that the required humanities courses, for instance, were demonstrably related to the art of teaching, the evaluation proceeds bit by bit, piece by piece, with no attention, except pro forma, given to the student's total behavior as a prospective teacher. And it is precisely the individual's total behavior that emerges as we consider state and individual interests in certification. This concern for the totality of the individual's behavior perhaps finds its expression in typical statutory or regulatory requirements concerning age, citizenship, and moral character. All of these requirements may well be regarded as steps--minimal, inadequate, and perhaps illegal--to subject the totality of the individual's behavior to scrutiny.

Historically, the "meat" of certification requirements, however, has been the "department and credit hour" requirements. Because of our educational structure, age requirements have been of little controversy. Good moral character requirements have for all practical purposes become unenforceable, except when obviously egregious acts have been committed. Thus the process of certification has for the most part amounted to "transcript evaluation," a process by which course titles and credit hours awarded are compared to the stipulated requirements expressed in essentially the same terms. This procedure might be characterized as a rule-laden process, with the rules comparable in many ways to rules applied in driving. One either stops at a stop sign or does not;

one is either exceeding the speed limit or not; one either has a certain level of alcohol in the bloodstream or not. One either has three credit hours in the history and philosophy of education or not; one either has 34 hours of general education or not. Because it is rule-laden, transcript evaluation is a relatively easy system to administer. Because of its rigidity, the state is forced to make no subjective judgments, to make no decisions open to challenge as long as it adheres to the rules it has adopted. It is, to use Veblen's phrase, "a mechanically drawn" system. For these reasons, certification by transcript evaluation appears to have acquired the hard-to-achieve attributes of fairness, certainty, and objectivity.

But underlying the system of transcript evaluation is a series of assumptions that on examination may render its superficial benefits less attractive.

1. Credit hours and course titles accurately measure the acquisition of knowledge and skills essential to the practice of education.

2. Colleges and universities report accurately concerning a student via transcripts.

3. There is at least a rough equivalence among colleges and universities as to what constitutes credit hours and courses bearing similar titles.

Should these assumptions be false, transcript evaluation at its worst requires only a cooperative registrar willing to post the requisite titles and hours of credit. The institution issuing the transcript need have no commitment to the preparation of school personnel; it need not have sufficient resources; it need offer no meaningful preparation. To prevent this possibility, several states have historically relied not on highly developed state systems of inspecting teacher education institutions but on voluntary accrediting associations, particularly on regional ones. The relationship between regional accreditation and teacher certification has apparently been based on the notion that regional accreditation attests to at least minimal quality, the necessary human and fiscal resources, and the existence of necessary record keeping and administrative integrity. The regional associations, however, accredit the "institution as a whole" and indirectly all of its programs, even though in accrediting the institution the regional association may well recognize unevenness among its various programs.

Furthermore, accreditation in the United States has historically been labelled "voluntary." A requirement that institutions be regionally accredited before they are permitted to educate school personnel strips the regional associations of their alleged voluntary character in fact, if not in theory. A delegation of authority, indirect or direct, to the regional associations to determine whether an institution ought to prepare educational personnel has at least two major consequences: (a) the association comes perilously close to engaging in state, as opposed to voluntary, action; and (b) the state has delegated a state obligation to a private body over which it has no control. The case of Lea College in Minnesota provides an example. This college, founded in the sixties in response to increased demand for admission to college, has been unable to gain North Central accreditation; and because North Central has not awarded accreditation, the state withholds

approval as a teacher education institution. To my knowledge, no independent examination of Lea College has been undertaken by the state. The issue here is not whether North Central acted incorrectly nor whether the state should have acted to withhold its approval. Rather the issue focuses on the state's premising its action on a private association's action.[20]

Even if these legal considerations are dismissed, recent developments in regional accreditation appear to render the regionals less useful as a means of regulating and policing institutions preparing school personnel. The regional associations, under pressure to respond to the uniqueness of institutions, have for all practical purposes abandoned their historical formalistic approach and have adopted a procedure under which the association attests to whether an institution is accomplishing the goals it has set for itself. While such an approach is preferable to the older rule-laden system that tended to focus on quantitative information, its relationship to questions surrounding the certification of teachers is even more strained. Orlans and his colleagues argue:

> A weakness of regional accreditation is that it has, for most practical purposes, stopped making quality distinctions. That will be denied, but we believe it is true and even axiomatic, for how can distinctions be drawn when all, or virtually all, eligible institutions are accredited?[21]

What we are examining at this point is the necessity of establishing a system that enables the transcript evaluation process to proceed with a modicum of certainty that transcripts submitted for certification carry some meaning. Because transcripts are highly generalized summary accounts comprised of brief course titles, a grade, and number of credit hours awarded, some mechanism is necessary to give additional meaning to them. In the past, and to some extent in the present, the regional associations have been looked to as that mechanism. But as we have seen, reliance on the regionals is beset with problems in the context of teacher education.

The same kinds of arguments apply when considering national program accrediting associations such as NCATE. If a state is to delegate entirely or partially its police power to NCATE or a similar organization, NCATE becomes involved willy-nilly in state action; and no state, at least in the past, has erected a system for monitoring NCATE. An additional issue in relying on NCATE is the unlikelihood that a national association can have the capability of assessing whether an institution conducts its teacher education enterprise so as to protect an individual state's interests. At the moment, my experience suggests that the search for a national set of standards for teacher education, like the search for a set of criteria for determining what is pornography, is illusory and probably impossible. As long as the obligation to provide public education remains with the states, it is they who are responsible for determining what the state interest is in teacher certification and for defining that interest.

Given these considerations, partial or total reliance on voluntary associations to confer meaning on transcripts is fraught with legal complications. But even if "meaning" could be attributed to transcripts through such a process, inadequacies still plague the transcript evaluation system. Under this system, even if supported by rigorous accreditation, the preparation

of personnel is likely to be piecemeal and rule-laden. Institutions still have to ensure that a student's transcript carries the right course titles and the correct number of credit hours in each category. Institutions are under no obligation to make an assessment of an individual's total behavior as a prospective teacher, and the state obviously cannot do so on the basis of a transcript. In short, even under the best of circumstances, transcript evaluation as a means of certificating is on the one hand too rigid and on the other too abstract to enable one to argue that the resultant certificate is directly related to the promotion or protection of state interests.

## ASSESSING INSTITUTIONS: PROGRAM APPROVAL

At present, a rigorous system of state-administered program approval is preferable to transcript evaluation. Under this system, the state delegates authority in explicit form to colleges and universities to prepare school personnel and to recommend individuals for certification. This delegation actually occurs in the case of transcript evaluation, but then it remains implicit and responsibility is not fixed. State program approval has a number of features that commend it:

1. It clearly fixes responsibility for assessing and recommending individuals for certification.

2. It permits the development of preparation programs that are not straitjacketed by a set of "department and credit hour" rules.

3. It opens the possibility of assessing a particular institution's preparatory efforts against views of state and individual interests.

Its weaknesses are those that plague voluntary accreditation:

1. Reliance on standards that have no empirically established relationship to the performance of those recommended for certification.

2. Reliance on human testimony provided by visitation team members.

3. Reliance on the same institution and ultimately the same personnel both to prepare an individual and to determine whether the same individual should be certified.

All of these weaknesses, real or potential, require further elaboration.

The setting of standards for a system of program approval appears to be a necessity. While ideally it would seem sufficient to require an institution to demonstrate that its proposed or present programs adequately respond to state and individual interests, the absence of more specific standards virtually eliminates the possibility of denying approval and making the denial stick when challenges are presented by the institution. The state, it would appear, has the responsibility for formulating what constitute the interests to be protected in sufficiently specific terms that an institition and the administrative agency can reasonably judge whether it is promoting and protecting those interests. On the other hand, the standards should be

sufficiently flexible to permit the best and maximal utilization of available resources. The distinctions I am making can perhaps be illustrated by analogy to traffic laws. A situation in which individuals are left to determine for themselves how they ought to conduct their driving--as in some shopping center parking lots--is intolerable. Some rules seem necessary, such as those relating to speed limits and stop signs. But beyond these basic rules it also appears necessary to establish standards. On the voluntary side, we are urged to "drive defensively," and on the enforcement side, some conduct is judged illegal against standards of "negligence."

It is my contention that given the present state of knowledge, the bases promulgated for program approval, to be defensible and practicable, must possess the character of standards rather than rules. There are several reasons for this contention:

1. Because we lack the necessary knowledge to claim that only one mode of preparing school personnel protects the interests at stake, opportunity to develop and pursue alternative modes not only attends to American traditions of pluralism but may in both the short and the long run enable more aggressive promotion and protection of interests involved.

2. Standards as opposed to rules provide sufficient latitude to enable, perhaps encourage, institutions to develop programs responsive to emerging or changing needs for school personnel.

3. Standards as opposed to rules almost inevitably keep questions of state and individual interests under continuing scrutiny.

The purpose of standards is to provide the bases for decision making, in this instance whether an institution is to be permitted to prepare educational personnel. And these bases ought to be related to theories of state and individual interests similar to those discussed earlier in this paper. That discussion resulted in these major conclusions about the relationship between state and individual interests to be served by certification:

1. School personnel act as agents of the state to ensure that its interest in socializing children is realized.

2. School personnel act as agents of the state in implementing educational processes that enable children to acquire "survival skills."

3. Children have an interest in assurance that they are afforded equality of educational opportunities.

We should add that prospective school personnel have an interest in being assured that approved programs do in fact prepare them to teach in and administer public educational programs.

These conclusions suggest that any standards that are developed cannot be founded solely on the basis of idealized notions of what constitutes a college or a university or notions of what constitutes the ideal teacher preparation program. Conventional formulations of academic standards, in fact, seem to be irrelevant.

## THE BASES FOR STANDARDS

How then can meaningful and enforceable standards be developed so as to enable protection of the interests we have discussed? All of these interests as we have formulated them have as their common emphasis the capability of the certificated person to perform in roles designed to facilitate promotion and protection of these interests. This common emphasis, however, is too general to permit construction of meaningful standards; a number of realities must first be addressed. First, school systems develop a variety of ways to respond to these interests, and in doing so they utilize and deploy school personnel differently. A standard or set of standards should enable judgments to be made on the basis of the roles created by school districts and the staffing patterns they develop. Apart from this basis, one is left with a set of standards analogous to the Boy Scout motto that encourages preparation for any possible eventuality.

To illustrate: Special education teachers may be assigned to a separate classroom, an itinerant role, or a learning resource classroom. Bilingual, music, art, and other categories of personnel may be assigned a similar range of roles. School psychologists may function primarily either as diagnosticians or in roles similar to community psychologists. Such distinctions of roles in various categories of school personnel can be extended almost ad infinitum. And it should be noted that we have not attended in this brief discussion to the almost certain role differences that are occasioned by the communities in which public education takes place. While it may be debatable, even in such a "standard" teaching assignment as in English, teaching that subject in poverty-stricken rural areas, suburban areas, and inner-city situations may require not only differences in teaching methods and techniques, but substantial differences in the so-called "content" to be taught.

The line of argument we are exploring indicates that a basic standard for approving programs must focus on the relationship between roles an individual may assume and the programs designed to prepare the individuals for those roles. Of course it is possible to argue that a set of standards should exist for each and every available role. Thus we could undertake, in NASDTEC fashion, to develop standards not only for elementary teachers, but for teachers in each and every area taught in secondary schools, vocational high schools, and so on as well as standards for supervisors, pupil services personnel, and various kinds of administrators. Such a system of standard making, however, is likely to retard institutions in developing or adjusting programs that demonstrably relate to emerging or changing school personnel roles. My own experience suggests that the availability of such standards evokes a mechanical response for institutions, a response characterized by listing courses relevant to each standard. In short, a system of standards specific to each category of personnel reintroduces a rule-laden rather than a standard-oriented system, a return to transcript evaluation writ large.

The central issue in this connection inheres in judgments concerning preferable strategies for managing the teacher education enterprise. The extremes in strategy can be characterized as (a) an a priori strategy under which the administrative agency issues detailed rules concerning a wide range of specific matters; and (b) an a posteriori strategy under which institutions are given considerable discretion to act, with the institutions being held accountable after they have acted. E. Leslie Normanton has commented on the second and, from my point of view, preferable strategy:

> The Plantagenet kings ruled almost entirely through the accountability of their provincial sheriffs, as Bishop Fitz Niegel's "Dialogue of the Exchequer" of 1179 clearly shows. This can be a more flexible and less burdensome way of coordinating administration with government than by the issue of multifarious commands from the centre. It allows greater independence than a system of remote control. A posteriori accountability may indeed furnish the best solution to the problem of reconciling independence with good administration.[22]

Whether or not one advocates a system of standards for each category of school personnel or more generic standards, the argument we have developed suggests that the basic standard must focus on the relationship of the role for which an individual is preparing and the preparation provided by a program for that role and variations within it. Once such a standard is established, a number of ancillary or corollary standards inevitably follow--standards focusing on fiscal and human resources; supervised practical experience; evaluation of students, graduates, and program; institutional and program stability; administrative capability; and so on through a number of areas including continuing and sustained relationships with public schools. Again, these standards can range from specific to general. For instance, one can require a specific faculty-student ratio in the area of student teaching, or that all secondary programs include a three-hour course in the methods of teaching an academic specialty. Such specific requirements, however, have serious liabilities.

Take, for example, a specified ratio of supervisors to student teachers. Such a ratio may be defensible in the average situation, say that of an institution placing all of its student teachers within a ten-mile radius of the institution. But its application to situations in which student teaching sites are located upwards of one, two, even three hundred miles from the supervisor's home base is likely to assure nothing about the quality of supervision. The same kind of argument may be made about virtually any quantitative specification in a standard. Such specification, even if enforced rigorously, probably will apply only to average or typical cases and is not likely to produce, over the long run, substantially improved preparation programs. Requiring a course for so much credit in methodology, for instance, overlooks the possibility that methodological matters may be systematically addressed in a variety of ways--during clinical and practicum experiences, during studies in the field of specialization, or independently outside of a course structure.

The tendency toward specificity in standards is an understandable one. It provides, at least on the surface, more certainty, provokes less anxiety, and attributes more "objectivity" to the whole process. But the difficulty with such specificity is that it tends to induce into the standards an unnecessary and frequently indefensible rigidity and arbitrariness. Arguments advocating highly specific standards can at best establish only a highly tenuous relationship between the standards and state interests.

At the same time, fundamental notions of fairness and attention to the basic purposes of certification and program approval dictate the establishment of standards that protect individual interests. Other standards aside

from those already discussed become necessary from this perspective, particularly standards designed to protect individual students preparing for an educational career. It is simply not in the state's interest to condone or promote practices that discriminate on the basis of attributes irrelevant to an individual's performance either as a student or as a prospective educator. In fact, under constitutional guarantees concerning equal application of laws, the state is obligated to ensure, at least under program approval mechanisms, that institutions to whom authority is granted do not make decisions based on race, creed, ethnicity, sex, and so on. Other standards related to this central concern soon suggest themselves--standards for appeals procedures, admission policies, and other crucial categories of policy, including nondiscriminatory counseling and advising.

This discussion of standards has not been conclusive with respect to the degree of generality or specificity they should achieve, but it has suggested two central standards:

1. That programs sponsored by the institution have a demonstrable relationship to demands associated with the roles for which they prepare personnel, with attention to variations within generic roles.

2. That students pursuing preparation be treated neutrally with respect to irrelevant personal characteristics.

The first of these two standards is related directly to the protection of state interests which we have identified. The second standard acknowledges that the erection of arbitrary and irrational barriers serves no state interest and indeed may well impede its realization and lead to discrimination against individuals.

## PROBLEMS IN ENFORCING STANDARDS

Whatever the precise character of standards developed and promulgated, a series of issues immediately emerge when decisions have to be made as to whether an institution or its programs in fact meet those standards. These issues can be categorized as: (a) burden of proof; (b) character and use of evidence; and (c) procedures for ensuring due process. The discussion that follows is based on common precepts and practices that are used in the area of administrative law.

The concept, burden of proof, can be succinctly described as a device for indicating who must make a showing to substantiate a particular action affecting the interests of an individual or group. In the context of program and institutional approval, it appears that the provision regarding burden of proof in the federal Administrative Practices Act Sec. 556 gives valuable guidance. According to this provision, the burden of proof, "except as otherwise provided by statute," falls on the "proponent of a rule or order." Although specific state statutes and regulations may provide other standards, this provision appears reliable for <u>general</u> purposes.

In practice, this rule appears to mean that institutions bear the burden of proof when seeking <u>initial</u> approval of themselves or their programs. The agency, on the other hand, appears to bear the burden when advocating denial of approval or some intermediate category such as provisional approval or

probation. One of the few cases focusing on this issue is Northwestern Institute of Foot Surgery and Chiropody v. Frank G. Thompson, Director of the Department of Registration and Education, et al.[23] The Appellate Court, overruling the Circuit Court's finding for the defendants, observed that the school had not been properly notified of its alleged noncompliance and the order to remove approval did not provide evidence of facts justifying the state's order. As William Hazard observes, this case seems to indicate that "the school's right to remain on the approved list could be terminated only by the state's carrying the burden of proof to justify its removal action."[24] The principles of this case, apparently controlling in Illinois, may or may not be applicable in other states. However, this decision seems to be consistent with generally accepted procedures associated with even minimal notions of due process. Due process appears directly applicable to removal of approval because an institution, in effect, is being denied an authority or privilege which approaches a property interest or business advantage.

A distinction between the principles governing the decisions made by voluntary and by state-mandated approval systems must be clarified. Historically, private associations, including voluntary accrediting associations, have not been held to the standards that impinge on governmental actions. Courts typically have held that membership in a voluntary association is subject to the rules and regulations agreed to by members of the association. Thus in State of North Dakota v. North Central Association, the court noted:

> The Association being purely voluntary is free to fix qualifications for membership; and to provide for termination of membership of institutions which do not meet the standards fixed by the Association. The constitution, by-laws, and rules of government of the Association measure the rights and duties of the members.[25]

Similar positions have been taken by other courts in cases involving Parsons College and Marjorie Webster Junior College, Inc.[26] While voluntary accrediting has not been subjected to close judicial scrutiny, some observers believe that as governmental agencies, particularly federal ones, rely on them more extensively, regarding the associations as purely voluntary will give way to more direct and pervasive court intervention.[27] State actions, unlike those of voluntary agencies, clearly fall under "due process" clauses in either state or federal constitutions, except perhaps in presumably rare instances where statutes preclude judicial review. In Illinois, administrative decisions relating to program approval are subject to judicial review, under the Illinois Administrative Review Act. Similar provisions appear to be the case in some other states, though they seem not to have been invoked by institutions.

It is also unclear what parties besides institutions can achieve standing. Though the possibilities may seem remote, it should be noted that where approval has been granted at some point but is then later denied or substantially curtailed, parties other than the institution as an entity may be accorded the right to be heard. Generally the requirement is that plaintiffs can obtain review when the administrative action has adversely affected their interest sufficiently that a case or controversy is possible. It remains problematical at this point whether students and individual faculty could

achieve standing for review. The case for their doing so would perhaps proceed in the following way.

It is reasonable to assume that students do enroll in institutions and their programs because of state recognition or approval. Counselors at local high schools and two-year colleges base their advice to students on information provided by the state education agency. Whether that information is intended to be used as such or not, state recognition/approval is interpreted as endorsement of institutions and programs.

Students who enroll at recognized institutions and in approved programs expect to graduate and obtain professional certification by entitlement. If institutional recognition or program approval is withdrawn while a student is enrolled, that student is confronted with the potential loss of a means for securing a livelihood. Because most current procedures do not provide due process for those interested students, their rights may be abridged by an ex post facto application of authority.

Recent student protection cases, Peter Doe and its progeny, suggest that in the case of adverse action students might have proprietary rights at stake as well since they have enrolled and pursued their studies in good faith and with the blessing of the state.[28] The principle that the catalog under which the student enters represents a contract suggests that if the institution truthfully represents itself and its programs as recognized and approved, denial of recognition or approval may need to be implemented so that present students are allowed to finish their work.

Arguably, faculty may also have rights. Individual faculty members may have taken employment because of state recognition and approval. As in the case of students, faculty members thus have a proprietary interest in their affiliation with given institutions. If recognition or approval is suddenly withdrawn, the immediate earning power of a faculty member is threatened. Further, the effect on the individual's professional reputation could be damaging to the extent that their earning potential is reduced. Unless due process is accorded, the individual rights of these persons may be violated.

The extent of faculty "rights" is unclear, but the U.S. Supreme Court's ruling in Board of Regents v. Roth may mean that individual faculty members have a right to a hearing where their "reputation or integrity" is at stake or where a stigma or other disadvantage foreclosing the "freedom to take advantage" of other employment opportunities may result.[29]

The issue then becomes the balancing of institutional, student, and perhaps faculty interests and rights against the interest of the state in certificating competent and well-prepared school personnel. Due process considerations are obviously not the only considerations; compliance with standards and criteria as expressions of state interest is controlling and takes precedence.

One other matter, which is becoming of increasing importance, needs to be attended to in the area of our present discussion. In several instances, institutions based in one state have developed centers, clusters, or satellites in other states. Often efforts will be made to attain approval for the foreign-based institution and its program. Though I have not been able to find discussions of such cases in the literature, the attitudes and tendencies of both state officials and college officials in already approved institutions are to preemptorily deny approval to foreign-state institutions. The issue that arises is whether such actions would be construed as monopolistic practices. As William Hazard notes in connection with the possibility of voluntary associations' engaging in monopolistic practices, "there is nothing

sacrosanct about education as a proper subject for governmental or judicial regulation." Further, a review of the Marjorie Webster case and subsequent commentary on it suggests that if states preemptorily exclude foreign-based institutions from consideration, the state may by liable for engaging in monopolistic practices.

At the moment, legal trends suggest that in acting to exclude institutions from accredited or recognized status, institutions may well assert that they have rights or interests to be protected. Currently, there is little case law that provides definitive guidance. But the case involving Marjorie Webster College, a proprietary institution, and Middle States Association, a voluntary accrediting association, may serve to illuminate some of the central issues.

Marjorie Webster College, a proprietary institution, sought to apply for accreditation by Middle States Association, but Middle States refused even to consider the application because it had an eligibility rule excluding proprietary institutions such as Marjorie Webster. The central issue in the ensuing litigation became whether the rule excluding Marjorie Webster was defensible. In this particular case, secondary considerations were (a) whether Middle States' exclusionary rule acted to restrain commerce and (b) whether "education" constituted commerce. The district court found the Middle States rule indefensibly exclusionary; the appellate court reversed this decision, finding for Middle States. On appeal, the Supreme Court refused to hear the case. Thus, the decision in this particular case suggests that different criteria are applied in judging the exclusion of institutions from certain benefits than in other sectors of the economy.

The debate, and some of the issues, that this case has raised are illustrated by the commentary of Donald Baker, former Director of Policy Planning for the Antitrust Division of the Department of Justice:

> I personally think that this case was decided wrongly, even on its own facts. To the extent that it rests on judicial deference to the nature of the underlying subject matter--education--it is a unique little aberration in the law. Secondly, the association's flat refusal to consider Marjorie Webster for membership seems entirely inconsistent with the Supreme Court's decision in Silver v. New York Stock Exchange, which required procedural due process for exclusion. Thirdly, the court's analysis of economic effects was inconsistent with the rationale of Associated Press and Silver. The test has never been whether an enterprise could survive without membership, but whether membership was an "important business advantage."30

Some issues remain unsettled. Whether states, for instance, can be found to engage in monopolistic actions in violation of antitrust statutes remains unclear and at this point is mostly a theoretical argument. But if the challenges being raised concerning voluntary accreditation are any guide, challenges of program approval decisions based on board due process considerations can be anticipated when actions to exclude are taken. After having reviewed case law, Hazard observes:

> It seems clear that this (Marjorie Webster) Court, given the proper set of facts, would have little difficulty in subjecting an accrediting body to judicial review as to antitrust policy and constitutional limitations. The possibility of the application of monopoly legislation increases as the efficacy and consequences of membership in accrediting bodies escalate in institutional and public policy realms.[31]

## INFORMATION AND DECISION MAKING

If "due process" is viewed as a necessary and central feature of a program approval system, a number of issues immediately emerge. While little ingenuity is required to develop a set of procedures enabling appeals of decisions and reconsideration of those decisions, providing a system that can meaningfully respond to substantive claims is more difficult. In devising such a system, attention must be paid to the kind of information or evidence that is used as a basis for decision making, its relevancy, its reliability, and its sufficiency. An exploration of these questions requires beginning with a description of the information that can be gathered about institutions and their programs, the sources of that information, and the tests to which it can be put. At the outset, it should be recognized that these questions have plagued voluntary and mandated systems virtually since their creation.

Paul Dressel's study of reports filed with the North Central Association revealed that "the examiner's reports . . . were notably weak in comments on evidence of institutional quality as reflected in the achievement of students." Frank Dickey and Jerry Miller argue that accrediting agencies have been "forced to rely more than is ideally desirable both on personal judgments which are fallible and on quantitative factors which do not always have a direct or proven correlation with excellence."[32] At the same time, these questions, in spite of the controversy surrounding them, have not been seriously studied. One hunts in vain for serious studies of the activities of visitation teams; at best one finds short articles such as Keaton's on bias in visitation teams.[33]

The kinds of information available to those making decisions about institutions and programs can be characterized as ranging from quantitative data to the most blatantly biased observations of team members to the traditional gripes of faculty members and students. Decisions about institutions and their programs thus may potentially rely on inaccurate and prejudiced information. The usual available sources of information appear to be: (a) the institution and its representatives, including faculty, administrators, and others; (b) students at the institution; (c) cooperating agencies and personnel such as local education agencies and cooperating teachers; (d) graduates and former students; (e) employers of graduates; (f) visitation team members; and (g) historical information contained in the approval agencies' files. One should perhaps add that information is also supplied by the public and professional press; that is, in some instances, events occurring at institutions are reported so that the attitudes of the general public and professionals toward a public institution may be affected prior to, or during, the decision-making process. These events may range from bizarre student behavior, to

notices of massive faculty layoffs, to an adverse financial situation. This kind of information will be excluded from our considerations here since it properly cannot be construed as evidence, though it may provide suggestions for lines of inquiry during the decision-making process. In short, the general reputation of an institution cannot properly be allowed to influence a program approval system based on a compliance model.

The information supplied by these various sources may well range from the credible to the incredible, from the reliable to the unreliable, from the relevant to the nonrelevant, from "factual" to mere opinion, from direct observations to information based on hunches and subliminal clues. The problem to be confronted, then, is the transformation of this information into evidence that may appropriately serve as a basis for decision making. Consideration of this process of transformation leads headlong into the question: What constitutes evidence within the context of a program approval system? There is, so far as I know, no instance in which either a voluntary or mandated system has established formal policies regarding what constitutes evidence. In fact, the absence of any such policies or rules is more evident in the area of program approval than in the more general area of educational research and evaluation.[34]

It is outside the scope of this paper to propose a comprehensive set of such policies or rules. It is appropriate, however, to suggest some basic principles. To define, in advance of a particular case, what sorts of information will constitute evidence appears hopeless. Attempts to do so, as embodied in forms requesting quantitative data, for instance, tend to generate information that, at least in my experience, will not be used in the decision-making process. A more preferable procedure is to allow the definition of evidence to be determined by the issues that emerge during the decision-making process. By "issues," I refer to the points of controversy that arise as the available information is sifted; to speak of evidence in the absence of issues or points of controversy is virtually meaningless. Within the context of a compliance/noncompliance model of program approval, issues arise when the available information suggests that compliance with one or more standards has not been achieved. As suggested before, the information implying a state of noncompliance may be faulty on a number of grounds, or in some cases noncompliance may be implied by the absence of any information regarding a standard or set of standards.

In addition to this general principle--that what information constitutes evidence is determined by the points of controversy identified--a second general principle can be advanced. This principle centers on the kind of "rationality" that is characteristically employed in program approval and voluntary accrediting activities. Historically and at present, these systems have not been able to achieve adherence to the canons associated with "scientific" or "empirical" rationality. Instead of invoking a rationality that results in high degrees of predictive validity, program approval systems rely on a brand of rationality characterized more by "logical analysis" and a heavy dose of "common sense."[35] While some would allege that such systems cannot rise above intuition and hunches, it appears possible for program approval systems to pursue their activities in accord with a principle of rationality, indeed less preferable than that of "scientific" rationality but superior to mere intuition. But such an attainment is unlikely without

the creation of as rigorous a system as possible to sift or winnow available information.

## HUMAN TESTIMONY

At its center, a program approval system depends on, indeed cannot function without, human testimony. In categorizing the information that such a system can evoke, one may construct a category called "factual" information or evidence, but there is likely to be precious little of it and it is useless without further interpretation. Into this category of information, one can place some of the information that generally surfaces: budgets and resource allocations; number of, and some of the characteristics of, students and faculty; transcripts of students and graduates; and other similar informational items. The truth or falsity of these items can be determined, easily in some cases but with difficulty in others. But the mere number of books in a library or the salaries paid to faculty and administrators are in and of themselves virtually meaningless without an assessment of the appropriateness of the books to a program and without an assessment of the morale, commitment, and general satisfaction of the faculty. Thus, it turns out that the "facts" rarely speak for themselves. Indeed, "facts" can, as is well known, be misleading without their being placed in an appropriate context.

This appears to be the basic reason that voluntary accrediting and program approval systems have moved away from approaches based solely or heavily on standards or procedures involving quantifiable information. At present, proposals are emerging in some quarters to develop systems similar to those used earlier; they are known as "auditing" systems, and apparently have their source in analogies with auditing or accounting systems originally developed to monitor handling of monetary matters.[36] Whether such systems will be successful remains debatable, primarily because they view approval as merely a matter of validating information provided by institutions. They do not provide systematically and routinely for the introduction of human testimony, testimony that appears to be central to any meaningful system and necessary even to more sophisticated and "scientific" evaluation and research.

The human testimony characteristically relied upon by program approval systems can, for purposes of clarity, be divided into "direct" and "indirect" testimony. "Direct" human testimony usually is represented in both institutional and visitation team reports. The institution in its report, for instance, testifies as to its policies, its procedures, and its requirements. It may also offer testimony regarding the character of its faculty and its students as well as its expectations and plans. Team members likewise provide direct testimony. Almost without exception, team members report their observations concerning whether policies and procedures are carried out, whether the program adequately prepares persons for anticipated roles, whether the institution has sufficient commitment to its mission and programs. And team members may draw inferences from a set of facts, observations, and opinions.

In addition, both the institution and team reports conventionally contain "indirect" human testimony. Institutions either voluntarily or by requirement

frequently report the testimony of graduates, employers of graduates, and others regarding the merits or weaknesses of the institution and its programs. Institutions also from time to time report the findings and actions of other accrediting teams and bodies, the results of consultation with "experts," or the value of its programs as perceived by "advisory" committees.

Team visitation reports contain even more indirect testimony than institutional reports. Team members repeatedly summarize conversations and interviews with individuals and groups of persons. In the typical report, remarks and observations made by faculty, administrators, cooperating teachers, students, graduates, and others are included, sometimes in detail, more frequently in generalized and summary fashion. In many cases of indirect testimony, the identity of the person or persons being interviewed is not or apparently cannot be provided.

## COMPETENCE OF TESTIMONY

This brief characterization of direct and indirect testimony suggests a host of potential problems, the basic one being the competence of the testimony. In the business of institutional and program approval, the "facts" speak for themselves only in rare instances. This may be because of the nature of the available "facts." Or it may be that the truth or falsity of what we have called "facts" does not mean much apart from configuring and interpreting them. I am reminded here of a case in which an institution solemnly and truthfully claimed particular ratios of supervisors to student teachers; investigations revealed that the ratios were indeed achieved but that the placement of student teachers was geographically such that supervision was intolerably infrequent and perfunctory. Other instances in which the truth or falsity of a particular item or set of items is relatively inconsequential can easily be supplied. Facts need the addition of human testimony--direct or indirect--to achieve meaning and competence.

But what of the competence of direct and indirect human testimony? We can perhaps best address this problem through an example. In the following example, we limit ourselves to direct human testimony; indirect human testimony will be discussed later. Let us assume that in the review of teacher education programs, the following standard has been established:

> The program assures the acquisition and development of the knowledge, skills, and attitudes necessary to success as a beginning practitioner in a specific teaching, school services, or administrative role.

Our imaginary institution presents a program for the preparation of secondary English teachers. In demonstrating its compliance with this standard, the institution describes the efforts it has made to determine what knowledge, skills, and attitudes are necessary if one is to teach English successfully. The institution summarizes the beliefs of its English faculty, the perceptions of supervisors of student teachers instructing in English, meetings with advisory committees comprised of practicing English teachers and school administrators, and the results of surveys of graduates of the English program who

are presently teaching. Out of this effort has emerged a generalized description of the kinds of demands placed on the typical English teacher. Such a teacher, the description notes, must be able to practice various kinds of literary criticism; needs to know at least in survey fashion the standard canon of English and American literature; must have an understanding of traditional and modern theories of English grammar; must possess advanced writing skills and have the capacity to teach them; and the description ends with an argument that the prospective English teacher must have an awareness of and toleration for the various dialects of modern English. The program presented, we will assume, ensures that the student will study and practice in all of these areas, and evaluation of the student's mastery of the requisite knowledge, attitudes, and skills is thorough and comprehensive.

During a visitation, this program is reviewed by a person now in charge of instructing prospective teachers of English in the methodology of teaching English. He has a doctorate in English education from a prestigious graduate institution, and previous to the current year had taught secondary English for 12 years. In the course of his commentary concerning the English program's compliance with the standard quoted, the team member finds the generalized description of the demands placed on an English teacher to respond to the realities of which he is aware. He assesses the relationship of the work required for completing the program and the evaluation of the student and pronounces it superb. But he concludes this commentary by discussing the absence of any preparation in the area of teaching reading to secondary students. He describes a range of situations with which he is familiar, all of them involving students who have developed either no reading skills or only very basic ones. He then argues that, given the realities of a good number of English classrooms, the program fails to prepare English teachers adequately because there is no assurance that graduates will have any mastery of the knowledge and skills needed to respond to students' problems in reading.

How competent is this testimony? On what bases does one respond to it? The institution appears to have been acting in good faith and to have undertaken reasonable efforts to respond to the realities of teaching English in secondary schools. The team member, on the other hand, has no discernible bias or prejudice but is faithfully relating the program of preparation to the reality of English classrooms as he knows it.

The issue that has emerged at this point in our discussion is no simple matter; it relates directly to the interest of the state in assuring students equal opportunity to an education providing them with basic survival skills. And yet it would appear that on this issue the testimony of the institution and all those consulted--indirect testimony--is ranged against the testimony of a single individual. The one position tacitly argues that there is no need for work in reading; the other explicitly that there is a compelling need. It is unclear then whether the program complies with the standard, but it is clear that the testimony, conflicting as it is, is competent. Resolution of the problem cannot be achieved by finding any of the testimony incompetent; and other grounds must underlie the decision.

But let us suppose that the team member did not present the argument for the necessity of preparation in reading as he did. Rather, we will imagine that this person merely notes that the program is not in compliance with this standard because the International Reading Association has historically

advocated work in reading for all secondary teachers. In this case, it appears that the competence of the team member's testimony is not as clear. The relationship of a suggested guideline developed by an international professional body with a vested interest is, in my view, not as reliable as the testimony presented in the earlier example.

Several similar examples can be concocted, most of them probably having analogues in actual team reports. Generally, the degree of competence attained by the testimony offered by a team member, or an institution for that matter, is not likely to be affected by traditional measures such as the experiences, educational attainments, and reputation of a team member but rather by the relevance, reliability, and sufficiency of the testimony. The same is true for institutions; institutional reputations pale in importance against the character of the testimony an institution provides.

The relevance, reliability, and sufficiency of team member testimony--its general aura of competence--is likely to be enhanced or diminished by the way in which indirect human testimony is incorporated into his direct testimony. In the previous example, a situation was constructed in which the institution's best judgment and that of the team member were in open conflict. We should note that the competence of the institution's testimony was substantially increased since the example hypothesized that the institution had relied heavily on reporting indirect testimony--its advisory committee, its graduates, and so on. Had the institution merely relied on the convictions of its English faculty, the results might have been radically different. In our second example the team member provided not direct testimony but indirect testimony when reporting the recommendations of the International Reading Association. In order to facilitate exploration of the role of indirect human testimony as it relates to team members, more examples will be discussed. In addition to the commentary already described, the team member reports the following:

1. Interviews with students currently engaged in student teaching reveal that six out of the ten students report that they encounter difficulty with "slow readers."

2. Interviews with principals in two different school districts elicit the information that within the past two years, the local school boards have adopted policies requiring individualized instruction in reading for students with problems and this instruction is to be included in the English curriculum.

Such examples can be multiplied almost ad infinitum. The point here is that the indirect human testimony corroborates the direct testimony of the team member. Obviously one can conceive of examples that lessen the competence of a team member's testimony. He may report, for example, that in spite of his experience, no one--no student teacher, no cooperating teacher, no school administrator--upon direct questioning saw a need for preparation in the area of reading.

## RELIABILITY OF INFORMATION

The competence of direct human testimony is more than likely affected by the reliability it appears to possess. In the context of visitation team

reports--and institutional reports in some instances--the degree of reliability is affected to a great extent by the character of indirect human testimony that is reported. But because the reliability of the human testimony is crucial or central to the decision-making process, additional means of assessing it are needed. It should be noted that under systems of program approval of which I am aware, no provision is made for the reliability of the testimony to be established by means of direct confrontation through procedures such as cross-examination.

The reliability of indirect human testimony is even more difficult to assess than that of direct human testimony. It amounts, in some ways, to hearsay and suffers from the limitations of hearsay. Essentially, indirect human testimony consists of one person's reporting what another person or group of persons told him. Frequently in team reports, the sources are not identified, except by generic titles such as "students" or "cooperating teachers." And even in instances where more precise identification is provided, indirect testimony, unless combined with information provided directly by the team member or reported from identified records, can properly be given little weight, mainly because its reliability cannot be successfully assessed.

## RELEVANCE OF INFORMATION

The relevance of "factual" information and direct and indirect human testimony has to be determined in ways completely different from their reliability. Relevance presupposes that an issue has emerged, a point of controversy has been established. In the context of a program approval system operating on a compliance/noncompliance model, such issues arise when the available information implies or indicates the likelihood of noncompliance.

Once the possibility of noncompliance is established, relevance becomes a critical matter because a finding of compliance or noncompliance has to be, in accord with due process, substantiated by arguments. Except in those rare instances when the "facts speak for themselves"--perhaps a nonexistent event--the available information and evidence must be organized into an argument supporting the contemplated action. In the typical situation, the person constructing the argument has access to the institution's statements, the team report, and perhaps an institutional response to the team report. This person must attempt to balance the available evidence and, without easy and direct access to team members and institution, construct a fair and substantive argument. The act of balancing this evidence--once the degrees of its reliability has been assessed--proceeds with little more guidance than the canons of logic and "reason." Questions such as the following arise:

1. The standard requires an appeals procedure for students harmed by an allegedly arbitrary action and requires that students be apprised of its existence. The institution describes the mechanism; but the team member reports that in the past ten years no student has invoked the procedure. The question is whether the institution is apprising students of their rights when no students have exercised them. The inference may be logical or illogical, depending on one's point of view. To many, the fact that an institution could avoid allegedly harming students for a period of ten years is inconceivable; the fact of no appeals means that students are unaware of

the appeals procedures. To others, an institution could easily do so, and the fact of no appeals is evidence of the care the institution takes in making decisions. What begins to emerge in this brief discussion is that the "relevance" of evidence depends to a large extent on what is "reasonable" when discussing institutions of higher education. There are at work in these situations, in my view, several sets of assumptions concerning institutional behavior, assumptions similar to the notion that a wife is not likely to offer adverse testimony against her husband.

2. The standard requires that a means of developing policy affecting preparation programs exist; the institution claims that because the faculty and administration are small, dedicated, and committed, informal communication occurs daily and results in the development of policies that, for the most part, are informal. The team member reports that faculty and administrators repeat what the report says, that investigation revealed no formal and deliberative mode for policy development, and that several alleged policies could not be documented. Can the conclusion that a state of noncompliance exists be sustained? Again, the argument is one from the negative. And once again the relevance of the team member's observation depends on one's view of the standard of "reasonableness" to be applied. The issue amounts to this: Is it probable or highly probable that an institution of higher education can be meaningfully said to develop and implement policy in the fashion described? An affirmative or negative response to this question is likely to be determined by the kinds of assumptions one makes concerning typical institutional behavior.

Instances such as this can be concocted or found in actual reports. The crucial element in the decision-making process turns out not to be the evidence available but what inferences can reasonably and properly be drawn and, at a deeper level, the assumptions one makes about typical institutional behavior. That this is so should not be surprising; such assumptions are daily acted on in assessing individual behavior. It may well be the case that the controversies and fears surrounding the creation of review boards or commissions dominated by practitioners have their source in the application of a different standard of reasonableness and a different and competing set of assumptions concerning institutional behavior. The standards erected and the processes of decision making followed by such boards have not changed substantially; what has changed is the assessment of the probability that an institution is in compliance. Put another way, achieving the necessary degree of "convincedness" favorable to the institution requires more evidence, more persuasion. Perhaps the apparent change can best be illustrated by noting that voluntary accreditation has involved almost exclusively those intimately associated with higher education who share more or less in common a "sense of how things go" in an institution, a common "rationality." The kind of rationality employed by others now involved may vary markedly.

It is likely impossible and probably unprofitable to attempt a description of the standard of rationality or sets of assumptions that will be utilized in a specific program approval system. Guidance can be provided, however, either through a set of precedents or by what Davis has described as hypothetical rule-making.[37] It appears from casual observation that precedents may be of little utility in state approval systems until they

achieve more maturity and until more agreement can be realized around questions of "rationality" and relevance of evidence. The construction of a set of hypothetical cases and a description of how a decision relating to the case was reached might provide more reliable guidance. This approach appears to be akin to manufacturing "precedents" in a vacuum, but such a judgment undervalues the potency of the approach, for it does allow an idealization of the issues (usually impossible in an actual case) and, in addition, is likely to reveal more fully the implicit assumptions at work. Such an approach illuminates general directions that may not be evident in the case-by-case accretion of precedents, and enables treatment of issues that may not emerge in precedents. In the absence of some method of describing the "rationality" tests employed in a program approval system, particularly when those tests appear to be changing, charges of arbitrariness and caprice can only be anticipated.

## SUFFICIENCY OF INFORMATION

We move now to the third general principle employed in use and assessment of evidence, that of sufficiency. Our discussion of the principle of "relevance" enables us to minimize discussion of sufficiency since the issues are similar in many ways. The questions that arise in this area of consideration center on how much of what kind of evidence is necessary to sustain a particular action. The only accurate answer appears to be, "It depends." Even if the available evidence has been found reliable, and even if it has been organized persuasively and fairly in support of a specific action, the issue of its sufficiency must be addressed. Here the old saw about how reasonable persons may disagree is directly applicable because of the variance in what it takes to "convince" those participating in the decision-making process. Certainly the degree of "convincedness" that an individual participating in the process feels he/she has to achieve is likely to be determined by an assessment of the consequences to interested parties of a particular action. Thus, at this point, the decision makers must in almost judicial fashion establish for themselves, individually and collectively, a means of balancing the competing interests and the evidence.

## ALTERNATIVES FOR PROGRAM APPROVAL SYSTEMS

In this discussion of issues relating to the use of evidence in a program approval system, it has become clear that such a system depends heavily on what appear to be "subjective judgments." Only a relatively low degree of certainty and predictiveness can be achieved in crucial areas. Dramatic advances in the technology of assessing institutions for compliance that improve this degree of certainty are not likely in the near future. But what some would label lack of certainty, others may label as the "dynamic quality" of program approval. What is interpreted as arbitrariness by some may be seen as giant leaps in the protection of state interests by others. Whatever one's point of view, fairness and attention to the principles of due process require (a) an open system; (b) the preparation of "opinions" or

reasoned arguments in support of each specific action; and (c) a procedure for appealing actions.

In discussing these three topics, I am relying heavily upon the suggestions of Kenneth Culp Davis in his book, Discretionary Justice: A Preliminary Inquiry.[38] His considerations regarding the exercise of discretionary power, its potential abuses, and the necessity of constraints on exercising it deserve careful study by those exploring issues such as those discussed in this paper. At one point, Davis observes that "one valuable weapon in the fight against arbitrary exercise of discretion is openness." Yet the tendency in American public administration, outside of formal hearings, is toward secrecy, Davis thinks that more than 90 percent of the American administrative process occurs "behind closed doors." The lack of openness in procedures associated with certification and program approval, and some reasons for it, are suggested by Mitchell Wendell:

> Teacher certification agencies operate processes in which the officials and employees may in fulfillment of their human nature prefer not to respond to inquiries about the types of records they keep or their content. This is likely to be in relation to the criteria they employ in determining whether particular applicants should or should not receive certificates and the weight they assigned to pieces of information or allegations contained in individual files. It is probably not that many of the decisions would likely be found wrong. Rather, it is that they might be troublesome to document or justify in a way that would appear to all as scientific and objective.[39]

While the tendency toward secrecy is perhaps understandable, making both the easy and the difficult decision in the open, whether through informal or formal processes, seems necessary to avoid the unjust and unfair exercise of judgments on the part of decision makers.

In part, openness can be fostered by establishing a system under which written opinions or briefs in support of specific actions are prepared and made public. We can perhaps in this instance learn from what I believe was a mistake in the conduct of affairs by some voluntary accrediting agencies. Morris Keaton observes that the North Central Association's "procedures (now changed) call for examiners to file with the Reviewing Committee a 'Pink Form' which states precisely the examining team's statement of its recommendations and of its reasons for its recommendations, but mandates that this statement not be shown to the institution's representatives at any time." He goes on to note that the Reviewing Committee may accept or reject these recommendations, and that only the Commission's ultimate findings and reasons are disclosed to the institution. Keaton argues that early disclosure of the team's recommendations and reasons for them "could affect significantly both the fairness of decisions and the quality of examiner reports."[40]

Other persons have proposed yet other systems that appear to foster openness and promote fairness. One of the most intriguing is that proposed by Robert Wolf.[41] Wolf has outlined a ssystem based on selected principles

utilized in civil trials. Essentially the system depends upon adversary procedure. Among the apparent benefits of such a system, aside from its openness, are: (a) direct access to those providing testimony and an opportunity to explore the shades of meaning in their statements; (b) the opportunity to establish a more full and accurate record; and (c) the opportunity to detect bias, explicate implicit assumptions, and challenge inferences. The disadvantages of instituting such a system are: (a) the costs associated with such a process; (b) not all program approval decisions reasonably require such a process; and (c) unless carefully planned, the process may become so encumbered with procedural issues that the significant issues become lost or distorted and are not presented in straightforward fashion. In spite of its disadvantages, this system may be appropriate for classes of decisions that could yield significant policy consequences and important results for interested parties.

On the other hand, on a day-to-day basis, more informal procedures appear appropriate. One can imagine a system under which (a) an institution is accorded opportunity to respond in writing to a team report; (b) the institution is notified of proposed actions, and reasons for them, and given the opportunity to respond; and (c) the actions taken are based on a record containing the evidence sustaining the actions. While this informal procedure may not provide the safeguards inherent in more formal procedures, it can accommodate the presentation of unrestricted written and oral arguments by interested parties. The major defect of informal procedures in the context of program approval systems is that they do not enable decision makers or interested parties to confront directly the persons who have developed important information or who may have been involved in developing recommended courses of action.

This deficiency may be compensated for by the establishment of appeal procedures that are more formal than those used at the initial level of decision making. With the grounds for appeals clearly specified, an institution and other interested parties, if any, should be accorded direct access to all relevant documents and persons who have participated in the decision-making processes, and should have ample opportunity to present evidence supporting their contentions. In brief, the rather elaborate procedures outlined by Wolf may well be appropriate, if costly, in the appeals process. The initiation of an appeal by an aggrieved party would seem to indicate that significant issues have been joined and that a controversy meriting extended care and deliberation has arisen.

While such an arrangement appears sensible, I am aware that unless the consequences of an action are of a rather drastic nature institutions may, when considering the costs, forego seeking redress for what they judge inappropriate actions. While institutions may smart at receiving approval with recommendations for actions or an intermediate level of approval requiring specified courses of actions, they may well elect to avoid the cost and pain of an appeal. In such cases, justice may be denied and state interests not fully protected, at least from the institutions' point of view. In part, however, more careful and serious institutional responses to team reports and to proposed actions, and more attention by institutions to potentially serious matters at earlier stages in the decision-making process, would assist in mitigating the likelihood of these consequences. It may well be that as

program approval systems become more rigorous, and to some extent more formal, institutions will need to develop means to represent their points of view more forcefully and bring forth the necessary evidence to ensure just actions.

One of the inherent difficulties with the typical institutional-and-team reports system is in assuring that all the relevant information is produced. That is, the part of the approval system analogous to "discovery" in law needs considerable attention. Just as a native of a culture has difficulty in "anthropologizing" that culture, so institutions--at least in my experience--have great difficulty in reporting ordinary events and procedures, simply because the institution takes them for granted. Likewise, the three-day visitation places team members in the position of a visitor to a foreign culture who in three days is to provide an accurate and comprehensive report on the salient features of that culture. Part of the difficulty inherent in present approval systems, then, may be not only unintended bias and prejudice, but the emphasis on the question, "How has an institution ordered the preparation of education personnel?" rather than on the question, "How is teacher education possible at this institution?" Emphasis on what I take to be the wrong question may well be encouraged by highly specific standards focusing on requirements associated with establishing order at an institution. On the other hand, it seems possible to combine a Parson's-like functional analysis with a more anthropological approach responsive to the organic character of teacher education and other agencies involved in the preparation of educational personnel.

Murray Wax, in an essay entitled "Some Dialectical Tensions Within Sociology and Anthropology," describes "a conflict between the search for precision and the search for accuracy" in the social science disciplines; these disciplines provide, in large measure, the theoretical underpinnings for accreditation and program approval systems.[42] He argues that "precision is not so much abstract virtue in social science as it is a necessity for certain types of investigations within mass society," and that "precision in social science has been acquired at the expense of accuracy and that is a poor bargain." The purchase of precision at the expense of accuracy has perhaps been based on the notion that refinements in methodology developed to supply precise results will simultaneously result in accurate results. The difficulty, however, is that the achievement of precision in systems designed for the assessment of education depends on the development of and belief in the reliability of selected proxy measures, whether grade-point averages, length of time spent in a learning setting, credit hours, or test scores. Simply stated, the search for precision is effective when there is an existing pool of faith or "sense of community" that the precise results are, to a large extent, accurate. At present, that pool of faith appears to be evaporating.

This paper is not an appropriate forum to develop in detail the implications of a shift from an approach based on a brand of functional sociology to one based more on anthropological procedures or a combination of the two. Yet the work of ethnomethodologists such as Garfinkel and others offers considerable insight into possible ways of formulating improved procedures associated with systems of program approval.[43] An immediate improvement might well be realized if it were possible to assign a highly trained observer to spend a week or two at a campus to develop ethnographic data and insights that could be made available to team members as well as decision

makers. While the additional costs may be prohibitive, such a process would perhaps increase the likelihood that a more contextual and meaningful treatment of other available information would occur.

## CONCLUSION

This paper has focused on state interests to be protected by certification and, by extension, on the process of program approval and on difficult problems in achieving equity and justice in administrative procedures associated with program approval. To complete our exploration of certification as an abstract system, we must undertake discussion more specifically focused on teacher education institutions and some emerging dimensions of their role in the system. While the foregoing explorations have inevitably focused indirectly on the role of teacher education institutions, it appears possible to formulate more specifically some aspects of this role.

While general descriptions of historical trends are inherently dangerous, it appears that in many areas of education, including the education of teachers, there is a discernible movement to place more and more formal and informal authority in centralized state agencies. Not only does this trend represent a curtailment of traditional independence and autonomy for teacher education institutions, individually and collectively, but it also entails a devaluation of the role of voluntary groups and associations or a realignment between the roles of state agencies and voluntary groups. Whatever the reasons for it may be, the shift of authority toward centralized state agencies requires that institutions preparing educational personnel develop new methods of contributing to defining the character of state interests in teacher education and certification. Earlier in this paper, a discussion of the changes in the "rationality" used in making decisions concerning institutions was undertaken. If my observations are correct, institutions affected by new standards of "rationality" and new conceptions of what constitute reasonable expectations of institutional performance need to develop new and probably more sophisticated means of responding to these standards and expectations. While the effort required to do so may be enormous, undertaking the task will almost inevitably assist in improving the methodology available to protect state interests.

Further, institutions preparing teachers need to begin almost immediately to develop the capacity to assess the totality of a candidate's behavior and capacity, and to do so in ways that are related to potential roles and jobs and that do not depend on irrelevant personal characteristics. While other agencies, both federal and state, are likely to apply pressures in these general directions, it can reasonably be expected that institutions will be under increasing pressures, from students to gain access to education programs and at the same time from others to curtail the number of students and programs and assure that those graduating are thoroughly prepared as beginning practitioners. These twin pressures, together with the commonsense notion that unfair and arbitrary assessments of candidates cannot be tolerated, will require more comprehensive and detailed assessment procedures and techniques than the computing of grade-point averages, perfunctory interviews, and less than rigorous field experience and student teaching programs.

Since teacher education institutions, like program approval agencies, have delegated to them significant responsibilities and considerable discretionary powers, they too must address several of the issues raised in connection with the operation of program approval systems. Standard setting and questions of the reliability, relevance, and sufficiency of evidence are all issues that immediately arise for institutions. Should institutions fail to address these questions seriously and competently, not only is the prospect of unwelcome litigation probable, but the desirable diversity in institutions and programs may well be eliminated by increasingly inflexible state mandates in the direction of competency-based teacher education or some direction equally unpalatable to many teacher educators.

But perhaps the most unsettling aspect of this task is the necessity for sharpening the institution's mission as it relates to teacher education. Doing so is likely to call for new patterns of organization within institutions and relatively radical restructuring of relationships not only to centralized systems of authority but to local school districts and other agencies involved in teacher education. Failure to undertake these tasks will almost inevitably result in the issuance of more detailed, numerous, and probably inflexible rules for institutions to observe. The system of decision making implicit in the issuance of such rules is not only contrary to American traditions and common sense, but also likely to result in a less than productive and rigorous system of preparing educational personnel. Such nightmarish fantasies as these may become reality if institutions do not become responsive to the dynamics of changing state interests and to the necessity of safeguarding their own actions from caprice and arbitrariness.

## NOTES

1 One of the more extensive discussions of the need for teacher certification appears in: Martin Haberman and T.M. Stinnett. Teacher Education and the New Profession of Teaching. Berkeley: McCutchan Publishing Corp., 1973, p. 17. The discussion is one paragraph long.

In preparation of this paper, I was able to uncover no literature that treated "state interest," though courts routinely invoke the concept. The distinction between "public" and "state" interest may be nonexistent. The literature on public interest is extensive, and for the purposes of this paper was virtually of no assistance because the discipline of political science has moved away from normative concepts to empirical studies. I drew most extensively on: Virginia Held. Public Interest and Private Interests. New York: Basic Books, 1972. Typical discussions of public interest include: (a) Frank J. Sorauf. "The Public Interest Reconsidered," Journal of Politics 19, Nov. 1957; (b) B. M. Barry and W. J. Rees. "The Public Interest," in Proceedings of the Aristotlean Society for the Systematic Study of Philosophy, Supplemental Vol. 38, 1964, pp. 2-38; (c) Pendleton Herring. Public Administration and the Public Interest. New York: Russell and Russell, 1936, reissued 1976; (d) Martin Meyerson and Edward C. Banfield. Politics, Planning and the Public Interest: The Case of Public Housing in Chicago. Glencoe, Ill.: Free Press, 1955, especially pp. 285-329. See also: "Panel I: What Is the Public Interest? Who Represents It?" Administrative Law Review 26, no. 4, Fall 1974, pp. 385-418.

2 William H. Drummond, "Role of State Department of Education," and James D. Koerner, "Governance of Teacher Education," in: New Perspectives on Teacher Education, Donald J. McCarty and Associates, eds. San Francisco: Jossey-Bass, 1973.

3 Michael A. Rebell. Teacher Credentialling Reform in New York State: A Critique and a Suggestion for New Directions. Lincoln, Neb.: Study Commission, n.d., p. 36.

4 Memorandum to members of the University Council for Educational Administration Certification Commission summarizing meeting in Columbus, Ohio. Mimeo. Quoted from Leadership in Public Education Study: A Look at the Overlooked. Washington, D.C.: Academy for Educational Development, Inc., 1972, p. 33.

5 Mitchell Wendell. "Legal Issues in Certification for the School Professions." Paper delivered at the February 4, 1976, meeting of the Contract Administration Association of the Interstate Agreement on Certification of Educational Personnel, St. Louis. Mimeo.

6 John C. Hogan. The Schools, the Courts, and the Public Interest. Lexington, Mass.: Lexington Books, 1974, p. 153. A. W. VanderMeer, in "Legislatures, the Courts, and Teacher Education," School Review 82, Feb. 1974, p. 282, reports that a bill was introduced in the 1972 session of the Pennsylvania legislature that would prohibit any employer from requiring as a "condition of employment or promotion, any degree, diploma, certificate, test, examination, or other qualification not reasonably related to the tasks to be performed." It died in committee.

The literature on occupational licensing has grown rapidly in the past few years. See, among others: (a) Benjamin Shineburg et al. Occupational Licensing: Practices and Policies. Washington, D.C.: Public Affairs Press, 1972; (b) Corinne Lathrop Gilb. Hidden Hierarchies: The Professions and Government. New York: Harper and Row, 1966; (c) Albert Maslow. "Licensing Tests---Occupational Bridge or Barrier?" Proceedings, Third Annual Conference, Council on Occupational Licensing, Inc., July 1971.

The following pieces focus more particularly on legal issues in licensing or certification of teachers: (a) William A. Robinson. "The Power of Competency-Based Teacher Education: Views of a Civil Rights Lawyer." Appendix I in The Power of Competency-Based Teacher Education, Report of the Committee on National Program Priorities in Teacher Education. Boston: Allyn and Bacon, 1972; (b) Betty Levitov, ed. Licensing and Accreditation in Education: The Law and State Interest. Lincoln, Neb.: Study Commission, 1976; (c) Paul Tractenberg. "Legal Issues in the Testing of School Personnel," Phi Delta Kappan 57, no. 9, May 1976.

The following cases are of relevance to certification of teachers: Griggs v. Duke Power Company, 401 U.S. 424 (1971); Chance v. Board of Examiners, 330 F. Supp. 203 (S.D. N.Y., 1971), aff'd 458 F. 2d 1167 (2nd Cir., 1972); Baker v. Columbus Municipal School District, 329 F. Supp. 206 (N.D. Miss. 1971), aff'd 462 1112 (5th Cir., 1972); U.S. v. Nansemond County School Board, 492 F. 2d 919 (4th Cir., 1974).

7 Robert Howsam et al. Educating a Profession. Bicentennial Commission on Education for the Profession of Teaching of the American Association of Colleges for Teacher Education. Washington, D.C.: the Association, 1976, p. 115.

8 See summary of research in: Illinois Policy Project: Accreditation, Certification and Continuing Education; Task Force Reports. Evanston, Ill.: Northwestern University School of Education, 1976, pp. 17-20. Mimeo.

9 John Hopkins. Basic Legal Issues in New York State on Teacher Certification. Lincoln, Neb.: Study Commission, 1973, p. 4.

10 Individual teachers obviously have interests to be protected; see Ibid., pp. 11-13.

11 Brown v. Board of Education, 347 U.S. 483 at 493. See also Hobson v. Hansen, 269 F. Supp. 401.

12 Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (1972) and Mills v. Board of Education, 348 F. Supp. 866 (1972).

13 Hunnicutt v. Burge, 356 F. Supp. 1227 at 1229. Emphasis added.

14 This essay appears in Philosophical Redirection of Educational Research, 71st Yearbook of the National Society of the Study of Education. Chicago: University of Chicago Press, 1972, pp. 301-303.

15 Michael A. Rebell, op. cit., p. 95. The case referred to and discussed by Rebell is Council for Supervisory Associations v. Board of Education, 23 N.Y. 2d 458 (1969).

16 Some delegations of such authority may be legally vulnerable. The courts have followed a number of theories, sometimes contradictory, in reviewing delegations of authority. See, for instance: Panama Refining Company v. Ryan, 293 U.S. 388 (1935); Schecter Poultry Corp. v. The United States, 295 U.S. 495 (1935); Lewis Consolidated School District v. Johnston, 127 N.W. 2d 118 (1964); Arizona v. California, 373 U.S. 546 (1963). See also J. Skelley Wright. "Beyond Discretionary Justice," Yale Law Journal 81, 1972, p. 75.

17 Lawrence D. Freeman. "The Management of Knowledge," Journal of Higher Education 45, no. 2, Feb. 1974, p. 85.

18 Thorstein Veblen. The Higher Learning in America, Louis M. Hocher, ed. New York: Augustus M. Kelley, Pubs., 1957, pp. 75-76. See also James M. Hefferman. "The Credibility of the Credit Hour: The History, Use and Shortcomings of the Credit System," Journal of Higher Education 44: 61-72; January 1973.

19 Robert Howsam et al., op. cit., p. 83.

20 "Accrediting Groups Are Accused of Stifling Innovation by Colleges," Chronicle of Higher Education, January 15, 1973, p. 1.

21 Harold Orlans et al. Private Accreditation and Public Eligibility. Lexington, Mass.: Lexington Books, 1975.

22 "Public Accountability and Audit: A Reconnaissance," in: The Dilemma of Accountability in Modern Government: Independence and Control, Bruce L. R. Smith and D. C. Hague, eds. New York: Macmillan, 1971, p. 320.

23 362 Ill. App. 439.

24 William R. Hazard. "Institutional Accreditation and Teacher Certification: Notes on the State of the Law." January 1976. pp. 16-17. Mimeo.

25 99 F. 2d 697 at 700.

26 Parsons College v. North Central Association, 271 F. Supp. 65 (1967) and Marjorie Webster Junior College, Inc. v. Middle States Association, 432 F. 2d 650 (1970) cert. denied 915 U.S. 367 (1970).

27 William R. Hazard, op. cit., p. 2.

28 See the discussion of "entitlements as property" in Illinois Policy Project, op. cit., Section I, pp. 28-29.

29 See Board of Regents v. Roth, 408 U.S. 564 (1972).

30 "Anti-Trust and the Non-Profit Organization," Non-Profit Report, March 1973, p. 17.

31 William R. Hazard, op. cit., p. 22. See also: Donald I. Baker. "Anti-Trust Enforcement in the Service Sector." Speech before Washington State Bar Association, Anti-Trust Section, Spokane, September 15, 1976. Mimeo.

32 Quoted from Financing Post-Secondary Education in the United States, Report of the National Commission on the Financing of Post-Secondary Education. Washington, D.C.: Superintendent of Documents, U.S. Government Printing Office, 1973, p. 172.

33 See Morris Keaton. "The Hidden Agenda of Institutional Evaluators." December 1973. Mimeo.

34 My indebtedness in the following discussion to Robert Wolf ("The Application of Select Legal Concepts to Educational Evaluation," unpublished dissertation, University of Illinois-Urbana, 1973) will be obvious to those familiar with Wolf's work.

35 I am indebted to Professor Thomas Green of Syracuse University and Paul Pottinger for the distinction among kinds of "rationality."

36 See, for instance: Fred F. Harcleroad and Frank Dickey. Educational Auditing and Voluntary Institutional Accrediting. ERIC/Higher Education Research Report No. 1. Washington, D.C.: American Association for Higher Education, 1975.

37 Kenneth Culp Davis. Discretionary Justice: A Preliminary Inquiry. Urbana: University of Illinois Press, 1971.

38 Ibid.

39 Mitchell Wendell. "Freedom of Information Statutes, Teacher Certification Agencies, and School Systems." State Education Department, Interstate Certification Project, Albany, New York. Mimeo.

40 Morris Keaton, op. cit., p. 11.

41 See Robert Wolf, op. cit.

42 In: A Time Half Dead at the Top: The Professional Societies and the Reform of Schooling in America, 1955-1975. Lincoln, Neb.: Study Commission, 1975, pp. 111-23.

43 On ethnomethodology, see: Harold Garfinkel. Studies in Ethnomethodology. Englewood Cliffs, N.J.: Prentice-Hall, 1967.

III

# THE ROLE OF THE COURTS AND TEACHER CERTIFICATION

Stephen Eisdorfer

Paul Tractenberg

## PREFACE

The opinions expressed in this paper are those of the authors and do not necessarily represent the views of the Education Law Center, Inc., or the Rutgers Law School.

Stephen Eisdorfer
Paul Tractenberg
Education Law Center, Inc.
Newark, New Jersey

## INTRODUCTION

Recent developments in such areas as racial desegregation of the schools, bilingual education, school finance, education of the handicapped, and teachers' and students' rights have demonstrated the dramatic impact that litigation can have upon the direction and pace of educational reform. Critics of existing teacher certification practices have naturally looked toward the courts as a possible source of impetus for reform in that area, too.[1] In this paper we shall attempt to assess the role the courts may play in efforts to compel structural reform of teacher certification practices.

## PATTERNS OF TEACHER CERTIFICATION

While teacher certification may serve a number of disparate purposes, including limiting entry into an already overcrowded profession, its primary function is to assure that every public school teacher meets at least some minimum standards of personal fitness and professional competence. Teacher certification is now almost exclusively a state function rather than a local or federal one[2] and, in a sense, manifests a historical lack of confidence in the will or ability of local school districts to identify and select minimally competent teachers. Teachers, as a group, indirectly benefit from the existence of a certification system, since licensure is one of the identifying marks of professional status; but it is school children who are the primary intended beneficiaries of teacher certification.

The states have evolved a diversity of teacher certification mechanisms.[3] There may well be as many distinct certification schemes as there are states to operate them. Nonetheless, a number of major patterns of teacher certification practices can be identified.

## CRITERIA FOR INITIAL CERTIFICATION

Four distinct patterns of criteria for initial certification are now either in use or under serious investigation. They are course completion, program approval, written examination, and competency evaluation.

Course completion was the dominant form of substantive requirement for initial certification during the first half of this century and its usage was at one time nearly universal.[4] In recent years it has been supplanted to a significant degree by program approval, although many states that rely on program approval also permit course completion as an alternate route. All states utilizing course completion now require a bachelor's degree and completion of either specific courses or courses in specific subject areas, including student teaching. While states that rely on this mechanism inevitably achieve some practical control over course titles and general areas of coverage in teacher education, they have little control over the actual content, quality, or philosophy of the academic preparation of prospective teachers.

Forty-six states now rely at least in part upon program approval.[5] Under this mechanism, the state establishes guidelines for acceptable teacher education

programs, evaluates programs for compliance with those guidelines, and automatically accepts the credentials of graduates of approved programs. While program approval gives the state more control over the content, quality, and philosophy of the academic preparation of prospective teachers than do course completion requirements, it tends to shift the focus of attention away from the competence of the individual applicant to the quality of the program.

In response to demands for greater teacher mobility and for greater uniformity of standards, most states have come to rely at least in part on program approval standards promulgated by regional and national accrediting organizations. As of 1974, 38 states accepted out-of-state programs approved by the National Council for the Accreditation of Teacher Education (NCATE) or by the National Association of State Directors of Teacher Education and Certification (NASDTEC); 34 relied at least in part on accreditation decisions by NCATE, NASDTEC, regional accrediting organizations, or specialized professional groups in conducting their own in-state program approvals. As a result, program approval has begun to operate to a significant degree at a national rather than a state level.

A number of states encourage or require that approved programs be structured in accordance with the principles of competency (or performance) based teacher education (CBTE).6 The rationale behind CBTE is that most or all of the specific skills or competencies that contribute to successful teaching can be identified and taught, and their acquisition measured. CBTE programs are structured around acquisition of an identified set of specific skills or competencies rather than completion of a fixed curriculum. Students do not graduate until they have demonstrated mastery of these skills or competencies.[7] In the early 1970s a strong trend developed toward incorporation of CBTE criteria into state program approval standards,[8] but the perceived difficulty, both conceptual and technical, of identifying the skills or competencies that contribute to effective teaching and of measuring their acquisition has slowed, if not actually reversed, this trend.[9]

During the nineteenth century, written examination was the dominant criterion for teacher certification. The use of such examinations, however, has dramatically declined since then. As of 1974, only three states relied on written examinations--in all cases the National Teachers Examination (NTE)--as a criterion for initial certification, although a number of others required examination for certain advanced or specialized certificates. Written examinations have been accused of lacking job-relatedness and of discriminating against minorities. Since 1974, at least one state has been enjoined by court order from using the NTE for this purpose.[10]

A number of states are at least seriously considering evaluation of teacher competencies as a mechanism for initial certification.[11] Georgia, the state which appears to have the most fully developed plans, as of 1978 will require both completion of an approved program and achievement of a certain minimum composite score based upon local school assessment of student teaching and a teaching field criterion-referenced test.[12]

These patterns are, of course, not mutually exclusive. Many states allow several different routes to initial certification. Moreover, the patterns are repeated in more complex and varied combinations and permutations for advanced or specialized certification.

## SEQUENCE AND DURATION OF CERTIFICATION

In addition to patterns of criteria for initial certification, three distinct patterns of sequence and duration of certification can be identified, although these are somewhat less clearcut.

In a number of states, the initial certificate is granted for the lifetime of its holder.[13]

More commonly, periodic recertification is required. There may be only one certificate which must be renewed at fixed intervals, or there may be a sequence of certification, which must be completed within a fixed period after initial certification. Usually some quantum of continuing education is required for recertification. As of 1974, 14 states required the completion of the equivalent of a fifth year or master's degree program within a certain interval after initial certification.

Finally, a number of states grant advanced certificates for teachers who have completed fifth or sixth year programs. These certificates, offered as an inducement to voluntary continuing education, may be linked to salary scales or to longer recertification intervals or may be prerequisites to the granting of administrative or supervisory certificates.

## RELATIONSHIP TO OTHER MECHANISMS FOR ENSURING TEACHER FITNESS AND COMPETENCE

Teacher certification is, of course, not the only institutionalized mechanism for ensuring fitness and competence of public school teachers and cannot be fully understood in isolation. At least five other mechanisms have an impact on teacher quality: teacher education, local hiring procedures, inservice evaluation, in-service training, and tenure. While detailed discussion of these mechanisms is beyond the scope of this paper, a few remarks may help elucidate the relationship of these mechanisms to teacher certification.

### TEACHER EDUCATION

With the general abandonment of the written examination as a criterion for certification, academic preparation has become the single most important requirement for certification. The effectiveness of the certification process in sieving out the incompetents from among prospective teachers has thus become dependent on the ability of the teacher education programs actually to impart skills and personal qualities necessary for effective teaching and the ability and willingness of the state to distinguish those programs, if any, that successfully do so from those that don't. If either of those conditions is not fulfilled, the rationale for certification practices that rely on academic preparation, whether in the form of course completion or program approval, breaks down. The competency (or performance) based teacher education movement is at least in part a response to this problem.

### LOCAL HIRING PROCEDURES

In its earliest stage, teacher certification was a local function and was an integral part of the teacher hiring process. The history of teacher certification

is, however, one of continual centralization, with the present trend toward nationalization of program approval standards being simply the next stage in this evolution. Stated another way, the gap between the agency performing the certifying function and the agency performing the hiring function has been steadily growing. The fact that certification has become a state function while hiring has remained a local function has not wholly immunized certification from the large-scale forces of supply and demand that affect hiring. In times of teacher shortage, the states display increased tolerance for substandard certifications, while in times of oversupply, states crack down on substandard certifications and tend generally to raise standards for initial certification. Certification requirements are, however, less responsive to local supply and demand factors resulting from particular geographic, demographic, or economic circumstances than are local hiring procedures.

## INSERVICE EVALUATION

Inservice evaluation has traditionally been a local function carried out in connection with local rehiring and tenure-granting procedures. Only a few states have sought to compensate for the excessive attention paid in the initial certification process to academic preparation by making favorable inservice evaluation a condition of recertification.[14]

## INSERVICE TRAINING

One form of inservice training, continuing graduate education, has long been favored and rewarded in school personnel policies. As has already been noted, it is a condition of recertification in many states and a basis for advanced certification in others. It is also reflected on the salary ladders of most local school districts. In recent years, however, attention of reformers has focused on a different sort of inservice training: public school-connected training programs designed to remedy identified teacher needs or deficiencies. While there is a growing trend among the states to mandate establishment of and participation in such programs,[15] for the most part they have not yet been integrated into certification mechanisms.

## TENURE

Like hiring, the granting of tenure is a local function. Conceptually the grounds for removal of tenured personnel ought to be less stringent than those for revocation of certification, since they involve loss of a particular teaching position rather than deprivation of the opportunity to hold any teaching position. It is uncertain whether this is uniformly true in practice. In some instances, political and institutional factors may well make revocation of certification a more accessible remedy for demonstrated incompetence than dismissal under the tenure laws.

## CRITICISMS OF EXISTING CERTIFICATION LAWS

Critics charge that existing teacher certification practices fail in a variety of ways to perform their most basic function, that of ensuring that all teachers employed by the public schools are personally fit and professionally competent. Reference has already been made to some specific criticisms. Although by no means exhaustive, the following list illustrates the nature and range of the charges:

1. Criteria for certification, including course completion requirements, program approval standards, and written examination, bear only a tenuous relationship to the skills and personal qualities which make for effective teaching.

2. Insofar as states rely on program approval and course completion, their focus is mistakenly shifted from evaluation of the qualifications of the individual prospective teacher to evaluation of the teacher education program.

3. Although teacher effectiveness can really be evaluated only after the prospective teacher has actually begun teaching, most certification laws, even those that provide for renewable rather than lifetime certification or for a sequence of certificates, do not provide for any meaningful evaluation of teachers after initial certification.

4. Certification requirements are rigid and stereotyped. They are not sensitive to varying local needs, especially the needs of racial, ethnic, and cultural minorities, and tend to exclude or at least discourage individuals capable of responding to those special needs. Efforts to facilitate interstate reciprocity of certification by establishing national standards for teacher education program approval have tended to increase the rigidity of certification requirements and have thereby compounded the problem.

5. Present trends toward vesting control of certification mechanisms in professional associations and toward increasing academic preparation requirements do not address the problem of ensuring teacher quality.

Assessment of the validity of these criticisms is beyond the scope of this paper. We shall assume, for purposes of our analysis of possible legal challenges, that they are at least in part valid; so assuming, we shall consider the prospects for court-ordered structural reform in response to such charges.

## CHALLENGES TO THE RATIONALITY OF CERTIFICATION REQUIREMENTS

Many of the criticisms of existing teacher certification statutes can be characterized as charges that those laws are in some sense irrational: that they are ill-adapted to the function which they purportedly perform, that they impose requirements that have no necessary connection with teacher fitness or

competence, and that they cease evaluating at just the point when meaningful evaluation becomes possible. Traditionally, courts have entertained such charges in the form of allegations of violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution, which declare in pertinent part: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[16]

## SUBSTANTIVE DUE PROCESS

Although the term "due process," on its face, would seem to call only for procedural fairness,[17] in the last decades of the nineteenth century the U.S. Supreme Court began construing it to require also some degree of rationality in the substance of state laws under review. The court held that there must be some "real and substantial relationship" to permissible state purposes and, in a series of notorious cases, applied this doctrine of "substantive due process" to strike down a wide variety of state regulatory laws.[18] The expansion of the doctrine of substantive due process came to an abrupt halt in 1937. Retreating in the face of scholarly criticism and political pressure, the Court relaxed the standard of review, requiring the parties challenging state statutes as violative of substantive due process to prove that there was no conceivable rational relationship between the law in question and some legitimate state purpose.[19] This remains the prevailing federal constitutional standard; and, outside the realm of civil rights and civil liberties, virtually no state law has been stricken down by the Supreme Court as violative of substantive due process in recent years.[20]

Prior to 1937, the Supreme Court did overturn a number of occupational licensing statutes as violative of substantive due process, particularly those involving occupations that it deemed basically commercial in character.[21] Even in the heyday of substantive due process, however, the Court took a much more tolerant view of state efforts to license and regulate occupations directly connected with the public health or welfare. The leading decision of the period was Dent v. West Virginia,[22] a case upholding the licensure of doctors. The Court there declared:

> The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of

the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.[23]

In the post-1937 period, the standard of review has become even more relaxed than that stated in the Dent case;[24] although in one signal case, Schware v. Board of Bar Examiners,[25] the Court concluded that no rational connection, however tenuous, could be drawn between incidents in the candidate's personal life, on which the state had based its denial of a license to practice law, and his fitness or capacity for the practice of law, and therefore the Court overturned the state's decision as violative of substantive due process.

Even under the present relaxed standard of review, some successful challenges to existing teacher certification laws are conceivable. For example, following the Schware decision courts have become more receptive to the claim that an individual's private morality has no rational connection to fitness or capacity to teach and is therefore not a constitutionally acceptable ground for denying a teaching certificate.[26] While an analogous claim might be made that completion of certain course requirements has no discernible impact on teacher quality and, consequently, to condition receipt of a teaching certificate on completion of those courses is also violative of substantive due process under the Fourteenth Amendment, this type of claim appears unlikely to prevail at the present time. Absent a dramatic showing of irrelevance, even the speculative judgment of the legislature or state education officials as to what preparation teachers need is likely to provide sufficient rational connection to satisfy the requirements of substantive due process. Litigants who have attacked specific course requirements on those grounds have thus far been unsuccessful.[27]

## EQUAL PROTECTION

The focus of the Equal Protection clause is somewhat narrower than that of substantive due process. It is particularly concerned with the reasonableness of legislative and administrative classifications. While the early history of the Equal Protection clause to some degree parallels that of substantive due process--steady expansion of its application as a tool for federal judicial intervention into state economic and social legislation brought to an abrupt end in 1937--its more recent history is different because it became one of the chief vehicles of the Warren Court for protecting the rights of minorities and the poor. Its current status is, therefore, far more complex.[28] At present, the Supreme Court applies a two-tiered standard of review to state laws challenged as violative of the Equal Protection clause. If the classification involves "invidious" criteria--such as race, religion, national origin, or alienage--or impinges upon "fundamental rights," the Court applies a standard of "strict scrutiny" and will uphold the classification only if the state can demonstrate a "compelling interest" justifying the classification. In all other cases, the party attacking the classification can prevail only if it proves that there is no conceivable rational relationship between the classification and any legitimate state purpose.[29]

Before proceeding to an analysis of the application of this standard of review to issues concerning teacher certification, two points should be noted. First, the future of the two-tiered standard is itself uncertain. It has been criticized both from within the Court and from outside the Court as simplistic, mechanical, illogical, and unworkable.[30] While the Court has thus far declined all opportunities to abandon the two-tiered standard completely in favor of some more flexible test, it has in fact developed an intermediate standard of review where classifications based upon sex[31] and illegitimacy[32] are at issue. It is not inconceivable that the entire analytic structure that has accreted over the past ten years might soon topple. Second, although the standard employed at the lower tier, the "rational relationship" test, is linguistically similar to the standard of review under the Due Process clause, in practice the courts, including the U.S. Supreme Court, are much more ready to find an absence of rationality under the Equal Protection clause than they are under the Due Process clause.[33]

The landmark decision of Brown v. Board of Education,[34] striking down school desegregation, left a lingering impression that education would be deemed a "fundamental right" for purposes of analysis under the Equal Protection clause when an appropriate case presented itself to the Supreme Court.[35] Had that happened, a number of routes of attack upon existing teacher certification laws might have opened. Prospective teachers who failed to meet certification requirements might, for example, have challenged those requirements as lacking any rational relationship to teacher competence or fitness.[36] If, in a state utilizing a program approval approach, the standards failed to discriminate between demonstrably effective teacher education programs and demonstrably ineffective ones, public school students facing graduates of ineffective programs might have challenged the rationality of those program approval standards.[37] Indeed, given the logical persuasiveness of CBTE requirements and of certification based on actual evaluation of teacher competencies, and the generally scanty empirical validations of other types of teacher certification requirements, suit might have successfully been brought on equal protection grounds either by students or by prospective teachers to compel the implementation of such CBTE program approval standards or competency-based certification. Crucial to plaintiff's arguments in any of these lawsuits would have been the claim that education is a fundamental right and that any classification that impinges on the quality of education must be subjected to strict judicial scrutiny.

However, in San Antonio Independent School District v. Rodriguez,[38] the case upholding the Texas school finance system against allegations of violation of equal protection, the Supreme Court limited the list of fundamental rights to those "explicitly or implicitly guaranteed" in the federal constitution. Conceding the social importance of education, it nevertheless concluded that it was not such a "fundamental right."[39] The majority opinion in Rodriguez makes it very clear that the Court was strongly influenced in its conclusion by the fear that a contrary decision would create what it called "an unprecedented upheaval in public education,"[40] that is, a cascade of judicial decisions applying strict scrutiny under the Equal Protection clause to strike down a whole range of practices in the administration of public education, including teacher certification.

Hence, absent a showing that "invidious" criteria are involved,[41] litigation under the Equal Protection clause attacking the reasonableness of classifications made by teacher certification laws must focus on whether those classifications

can be justified under the "rational relationship" standard. The prospects and difficulties of successful challenges on this basis are illuminated by a series of cases in the Fifth Circuit Court of Appeals.

The first of those cases is Armstead v. Starkville Municipal Separate School District.[42] Plaintiffs in this litigation alleged that the school district's policy of requiring teachers to achieve a certain aggregate score on the Graduate Record Examination (GRE) as a condition for hiring or retention had a racially disproportionate impact and was, therefore, unconstitutional as racially discriminatory. The Court of Appeals, noting that the GRE was not designed to predict teacher competence and that the school district had no evidence validating the cutoff point it had selected, held that the policy was irrational and violated the Equal Protection clause, regardless of whether it had a racially disproportionate impact or not.[43] Significantly, however, the court did not strike down the provision of the school policy which permitted teachers to offer a master's degree or a Mississippi AA teaching certificate (which requires a master's degree in lieu of the required GRE score, even though the only locally accessible graduate school required a higher minimum GRE for admission to its master's degree program than the public school district itself required.[44] It would appear that, in the absence of proof to the contrary, the court was prepared to accept the defendant's claim that acquisition of a master's degree was rationally related to teacher competence.

The limited reach of the Armstead rationale was demonstrated in Tyler v. Vickery,[45] a case challenging the constitutionality of the Georgia bar examination. After rejecting claims that the examination was racially discriminatory, the court proceeded to evaluate the examination under the "rational relationship" standard. Adopting the Armstead analysis, it first considered whether the test was designed to measure the competence of prospective lawyers. It concluded that both the essay portion of the test and the Multistate Bar Examination portion, a multiple choice test constructed by the Educational Testing Service (ETS), were designed for that function. It then considered whether the cutoff points had been validated. On this issue, it concluded that, even though the chosen cutoff score had no empirically demonstrated significance, the fact that it represented "the examiners' considered judgments as to 'minimum competence required to practice law'" was sufficient validation.[46] The court also rejected plaintiffs' claim that the bar examination did not evaluate the full range of skills needed to practice law.

These cases suggest that where a particular criterion for teacher certification can be shown to be totally unrelated to teacher competence, it may be held to be violative of the Equal Protection clause. Mere absence of validation of job-relatedness will not suffice, however. The type of case in which this legal standard will permit successful challenge to certification criteria is exemplified by Georgia Association of Educators, Inc., v. Nix.[47] There the court struck down the requirement of achievement of a particular score on the National Teachers Examination (NTE) as a criterion for granting a six-year certificate, an advanced certificate available to teachers with at least three years of prior teaching experience. The court relied heavily on testimony of ETS experts to the effect that (a) the NTE was not designed to measure the competence of inservice teachers but only the academic preparation of prospective teachers, and (b) that the cutoff

score chosen by Georgia was not validated for such a purpose. This legal standard, if adopted by other circuits, obviously opens some possibilities for successful challenges to teacher certification laws under the Equal Protection clause, but only in a very limited and atypical class of cases. It would not, for example, permit a generalized attack on the lack of job-relatedness of course completion requirements or program approval standards.

Although it is litigation in the federal courts under provisions of the federal constitution that receives the most attention, nearly all state constitutions also contain due process and equal protection clauses similar to those contained in the Fourteenth Amendment.[48]

While most state courts have in the past interpreted their state constitutional provisions to be coterminous with analogous federal constitutional provisions, they need not do so, and there are sound reasons that they might choose not to.[49] The relaxed standard of review adopted by the federal courts in cases involving attacks on state law under the Due Process and Equal Protection clauses has a dual rationale. First, it is related to the doctrine of separation of powers, for it requires that the judiciary pay deference to the policy judgments of coordinate branches of government except in the clearest cases of violation of constitutional law.[50] Second, it is related to the American system of federalism, for it requires the federal government to pay deference to policy judgments of the states. State courts construing state constitutions are not constrained by considerations of federalism and may not feel as constrained by considerations of separation of powers as the federal courts.[51]

As a result, many state courts apply a more vigorous standard of rationality in substantive due process cases under state due process clauses.[52] Some states have also rejected the two-tiered standard in interpreting their state equal protection clauses.[53] There is a small but discernible trend among state courts, stimulated by disaffection with the decisions of the Burger Court and urged on by liberal reformers (including a justice of the U.S. Supreme Court), not to follow slavishly the decisions of the federal courts construing the federal constitution when interpreting provisions of their own state constitution.[54]

Even where state courts do interpret state constitutions in accordance with analogous federal constitutional provisions, the outcome need not be the same. For example, in Horton v. Meskill,[55] a Rodriguez-type school finance case filed in the Connecticut state courts, the Superior Court carefully followed the Rodriguez analysis of the Equal Protection clause in construing the Connecticut equal protection provision, including the Supreme Court's definition of a "fundamental right." Unlike the federal constitution, however, the Connecticut state constitution expressly provides for the establishment of a system of public schools; the court, therefore, concluded that in construing the state equal protection clause, education must be deemed a "fundamental right," triggering strict scrutiny. As a result, the court, even though it followed the reasoning of the U.S. Supreme Court in the Rodriguez case to the letter, felt obliged to reach a diametrically opposed conclusion and declared the Connecticut school finance statute unconstitutional. Since clauses dealing with education are common in state constitutions,[56] the routes of attack against existing teacher certification laws under the federal Equal Protection clause that were foreclosed by Rodriguez may still be available in the state courts under state equal protection provisions.

## CHALLENGES TO THE DISCRIMINATORY IMPACT OF TEACHER CERTIFICATION REQUIREMENTS

As the previous section foreshadowed, another legal challenge to a state certification system may be based upon allegations of racial or ethnic discrimination. Such a challenge would most likely be brought either under the Equal Protection clause of the U.S. Constitution,[57] or under Title VII of the Civil Rights Act of 1964.[58]

Title VII is the most prominent of the federal laws barring discrimination in employment. Covering all aspects of the employer-employee relationship, it prohibits discrimination on the basis of race, color, sex, religion, or national origin. Title VII extends, by its explicit terms, to employers, labor unions, employment agencies, and apprenticeship committees, whether in the private or public sector,[59] so long as there is sufficient impact on interstate commerce. The equal employment opportunity guarantees of Title VII are implemented by the Federal Equal Employment Opportunity Commission (EEOC).

Until the recent U.S. Supreme Court decision in Washington v. Davis,[60] the federal courts were tending to apply comparable standards to alleged discrimination in employment under either the Equal Protection clause or Title VII. This meant that Title VII's more stringent standards for employers generally have been used in Equal Protection cases. For example, federal courts have frequently held that employment procedures which have a racially disproportionate impact require that the employer justify those procedures by their job-relatedness and ultimately by the "business necessity" for them, without regard to the employer's intent.[61] Moreover, the guidelines promulgated by the EEOC under Title VII for validating employment practices[62] have been given great weight by the courts in Equal Protection as well as Title VII cases.[63]

Washington v. Davis provides new, and to some extent unclear, marching orders to the lower federal courts. In that case, which antedated the 1972 amendments to Title VII, two black applicants to the District of Columbia police force claimed that the police department's employment procedures, including a written personnel test, were racially discriminatory and violated the Due Process clause of the Fifth Amendment, a federal statute, and a provision of the D.C. Code. The district court rejected the plaintiffs' claim, but the court of appeals reversed this decision, finding that the racially disproportionate impact of the written test--four times as many blacks as whites failed it--established a constitutional violation, absent proof by the defendants that the test adequately measured job performance.

The U.S. Supreme Court reversed again, however. The majority in that case, speaking through Justice White, refused to apply the Title VII "effect without regard to intent" approach to the Equal Protection clause, even though the parties themselves conceded that incorporation of Title VII standards was appropriate. Absent evidence of discriminatory intent, the Court refused, in effect, to find a racial classification and therefore applied the relatively lenient "rational relationship" test to the employer's conduct.[64] Since direct proof of discriminatory intent is usually difficult to produce, if the Court really intends to require it as a prerequisite to a successful Equal Protection clause challenge then such suits will be far less attractive to prospective litigants. On the other hand, Justice Stevens' concurring opinion suggests that there is

no bright line between intent and effect; at least in his view, substantial evidence of a racially disproportionate impact may justify a court in inferring discriminatory intent.[65] Conceivably, the majority may subscribe to Justice Stevens' view, too, but on the facts before it in Davis it simply may have found an insufficient basis for inferring discriminatory intent.[66] For example, the majority noted that the District of Columbia police department had attracted, and was continuing to attract, a substantial number of minority officers, that many minority candidates who passed the qualifying test chose not to pursue their candidacies, and that the written test in question[67] was used for screening applicants throughout the federal Civil Service system.

The impact of the Davis decision on future Equal Protection clause claims of discrimination in public employment is difficult to predict. If the majority view actually is that plaintiffs must directly prove discriminatory intent, the case will have marked a significant shift in the federal courts' approach to the Equal Protection clause. Conversely, if Justice Stevens expressed more precisely what the majority intended, and this results in a willingness of the federal courts to infer discriminatory intent rather readily from evidence of discriminatory impact, then the shift is a relatively limited one.

The majority's opinion in Davis also cast a cloud of uncertainty over Title VII. This, too, may have substantial bearing upon legal challenges to teacher certification systems in light of Title VII's coverage of public employment since 1972. Although the Court found Title VII standards not applicable to the Equal Protection clause, and although Title VII was not applicable to public employers at the time of the alleged employment discrimination, the Court noted gratuitously and without substantial explanation that the test in question might well have met Title VII and EEOC validation standards.[68] The basis for this conclusion was a single validation study linking success on the screening test with success in the police's training academy. As Justice Brennan pointed out in his strong dissenting opinion, this study fell short of demonstrating the job-relatedness of the screening examination because there was no substantial evidence linking success in the training academy with success on the actual job.[69] Justice Brennan relied heavily on the Court's landmark interpretation of Title VII in Griggs v. Duke Power Company,[70] in which, after a showing of racially disproportionate impact, the employer could justify its selection process only by demonstrating the business necessity for and clear job-relatedness of the screening mechanism.

The uncertainty generated by the Court's reference to Title VII is even greater than that surrounding the Equal Protection clause since Davis was not a Title VII case and since the Court's discussion of Title VII was so limited. Further guidance is necessary before one can safely predict a dramatic turnabout in the judicial construction of that statute, but there is reason for concern.[71]

This analysis provides a backdrop for the issues now to be considered--those regarding the applicability of the Equal Protection clause and Title VII, as they are being construed by the federal courts, to state certification of teachers.

Under the Equal Protection clause, the requisite state action probably exists (except as will be indicated). But plaintiffs are likely to have substantial problems beyond that starting point. In view of the Davis decision, plaintiffs will have to prove, directly or by inference, that the state had a discriminatory intent in its establishment and implementation of a state certification

system. Since certification is an aspect of the civil service system's long-standing, if sometimes only theoretical, commitment to selection of public employees on the basis of "merit and fitness,"[72] a court will not lightly find a discriminatory state intent. Moreover, discriminatory impact sufficient to justify an inference of discriminatory intent will be difficult to establish under most certification systems. As has already been discussed, most states now utilize either the program approval or course credit approach. Consequently, the state itself is doing little, if any, actual screening out of individual candidates. Rather, the teacher training institutions by their student admissions and retention practices make the actual screening decisions, sometimes four or more years prior to certification. This makes the proof problem for plaintiffs far more complex. Also, the requisite state action may have to be established if private teacher training institutions make the important screening decisions.[73]

Several ways to prove discriminatory impact by the state may exist, however. If, for example, under the program approval method of certification the state regularly has approved programs in institutions with predominantly white student enrollments and regularly disapproved those offered by institutions with predominantly minority student bodies, the court might conclude that the state should have the burden of justifying its system. Another possibility is for plaintiff to demonstrate that the proportion of certified minority teachers is substantially lower than: (a) the proportion of certified minority teachers in other, demographically similar states; (b) the proportion of minority group members in the state's general population; (c) the proportion of minority group members in the state's college-graduate population, etc. These sorts of comparisons were influential in many lower federal courts prior to the Davis case[74] and may still carry some weight. On balance, however, the prospects are not great for plaintiffs to produce sufficiently dramatic evidence of the racially disproportionate impact of a program approval certification system to persuade a court that it should infer a discriminatory intent. The situation may be somewhat different if the state uses a written test for screening purposes and the pass rates on that test are much higher for white applicants than for others, but the Davis case suggests that finding, too, will not be sufficient. In several cases involving challenges to the written portion of state certification systems, federal courts have been influenced by evidence that the written test was being used in a way for which it was not designed, and that route may still be available.[75]

In light of the Davis case, Title VII may provide a sounder basis for a legal challenge to a state certification system. There is one threshold strategy question about the use of Title VII, though: before getting access to the courts, a complainant must follow lengthy administrative procedures through the federal Equal Employment Opportunity Commission.[76] In general, a charge of discrimination may be filed with the EEOC on behalf of an aggrieved person, after redress has been sought from applicable state and local offices. The EEOC investigates to determine whether there is reasonable cause to believe discrimination has occurred; if it finds such cause, it attempts to eliminate the discriminatory employment practice by conference, conciliation, and persuasion. In cases where this process does not lead to a settlement, either the EEOC (or the

U.S. Attorney General as to public agencies) files an action in court against the discriminating employer, or the EEOC must notify the aggrieved person of his or her right to bring a court action. These procedures can take a considerable period of time. On the other hand, the EEOC procedures may result in redress for the aggrieved party; or, if they do not, the EEOC may be an important source of support and expertise once the case goes to court.

Title VII makes it an unlawful employment practice for an employer: "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin,[77] or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[78]

The express language of this provision raises the first clear issue which must be dealt with regarding its use to challenge a state certification system: Is the agency which administers the system thereby an "employer," bringing its practices within the purview of Title VII? Or is there some other way to invoke the provisions of Title VII? The statutory definition of "employer"[79] is not especially helpful; it includes any "person engaged in an industry affecting commerce who has fifteen or more employees. . . ." Although state education departments undoubtedly satisfy that definition in one sense--they do affect commerce and have fifteen or more employees--nonetheless they are not involved in the traditional employment relationship with candidates for state certification.

Despite that difficulty, the EEOC has ruled in a related context that discrimination by a statewide licensing agency is covered by Title VII. In a decision rendered on May 6, 1975,[80] the Commission found reasonable cause to believe that respondents, the state insurance agency and an individual insurance company, had committed an unlawful employment practice in violation of Title VII. The practice in question involved the former's requirement that the employee pass a written examination as a precondition to licensing and the latter's discharge of the employee for failure to pass the examination. At the outset, the EEOC dealt with its jurisdiction to hear the charge under Title VII. Clearly, the insurance company was an "employer" of the charging party, but the status of the state licensing agency was not so self-evident. That respondent pressed the argument that EEOC had no jurisdiction over it because it "has never been an employer or prospective employer of the Charging Party."[81] The Commission rejected that argument as misconceiving the letter and spirit of Title VII:

> Throughout the Title and its legislative history Congress has indicated its intent to deal with more than the conventional employer-employee situation. . . . Courts have held that no employer-employee relationship need exist, only control over access to the job market and denial by reference to invidious criteria. . . .[82]

Having concluded that the company and the state insurance agency both were properly within its jurisdiction, the EEOC then evaluated the charging party's

claim of discrimination on the basis of national origin. "Spanish Surnamed Americans," of whom the charging party was one, had a pass rate of 46 percent on the licensing examination; others passed at a 61 percent rate. The EEOC concluded that this "substantially disproportionate adverse impact on Spanish Surnamed Americans"[83] shifted to respondents the burden of "justifying the use of the examination by at least demonstrating that it is job related."[84] But neither respondent offered any evidence to demonstrate that the examination was an accurate predictor of performance in the jobs for which it is used. Moreover, there was substantial evidence that the charging party had been an outstanding employee during the approximately 10 months he had been employed by the insurance company.

Thus, the EEOC found reasonable cause to believe that both respondents had violated Title VII. The state insurance agency had imposed a discriminatory test as a precondition to licensing insurance agents, thereby erecting "a barrier to the access of Spanish Surnamed Americans to this profession."[85] The insurance company, "by utilizing this test as an employee selection device,"[86] violated Title VII. The fact that the company was required by state law to employ only licensed agents (beyond an initial six-month period during which a temporary permit was sufficient) was not allowed as a defense since "to the extent that this testing requirement conflicts with Title VII it is superseded by and made invalid by Title VII."[87]

This EEOC decision is suggestive of the way in which a legal challenge to state teacher certification under Title VII could be framed. Jurisdictional arguments can be overcome without substantial difficulty based on the certification system's avowed "barrier to access." The more difficult problems may lie in demonstrating a sufficiently disproportionate impact involving one of the proscribed characteristics to shift the burden of justification to the state, and in countering the state's justification.

In states which use a written examination as at least a part of their certification process, the EEOC decision, and many court decisions,[88] indicate that the pass-fail rates of the group or groups charging discrimination, as compared to the pass-fail rate of other candidates, may be highly significant if not decisive. If such data is not already available, the EEOC or a court will usually have little trouble in ordering its production by the challenged party.[89] But that still leaves the issue of how much difference in the pass-fail rates is sufficient to demonstrate "disproportionate impact." One approach is to get expert opinion about the statistical significance of the differential, given the samples upon which it is based. In the case of Chance v. New York City Board of Examiners, a battle of experts raged on this question, with the court concluding that the differential (white candidates passing at 1 1/2 times the rate of minority candidates) did constitute a prima facie case for plaintiffs and should shift the burden of justification to defendants.[90] Another approach is to define in advance what differential generally constitutes disproportionate (or adverse) impact. For example, the U.S. Civil Service Commission's Guidelines on Employee Selection Procedures[91] provide:

> A selection rate for any racial, ethnic, or sex group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded as

evidence of adverse impact. Smaller differences in selection rate may nevertheless be considered to constitute adverse impact, where they are significant in both statistical and practical terms. Greater differences in selection rate would not necessarily be regarded as constituting adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.[92]

Finally, in some cases there appear to have been neither expert testimony nor specific guidelines but the EEOC or court has taken a "common sense" approach. In the EEOC insurance licensing decision discussed previously, for example, the following statement appeared:

> The Spanish Surnamed American examinees had a passing record of 46% whereas non-Spanish Surnamed American examinees had a passing record of 61%. On its face, these statistics reveal that the examination in question has the effect of excluding a significantly larger percentage of Spanish Surnamed persons. Hence Respondents are faced with the burden of justifying the use of the examination by at least demonstrating that it is job related.[93]

If state certification is not based at least in part on a written examination, proof of disproportionate impact becomes more complex. This is especially so under the most common certification systems--program approval or course completion. Under both approaches, it is, in effect, the teacher training institution which screens individuals. Even if it could be established that the institution's admission or retention policies had a disproportionate impact (that is, that a substantially higher proportion of non-minority applicants were admitted to the program or successfully completed it), does that alone demonstrate that the certification system of the state had a disproportionate impact? Perhaps it would be sufficient if coupled with evidence that the state had effectively delegated authority under a program approval or course completion approach to particular institutions.[94] Under the law of agency or the somewhat more specialized law governing delegations of authority, the principal, or delegator, remains ultimately responsible for what the agent, or delegatee, does in exercising the delegated power. If the delegatee's actions have a racially or ethnically disproportionate impact, the delegator--the state certifying agency--may be held responsible. The possibility of this result is enhanced by the fact that the finding of disproportionate impact establishes a prima facie case which can be rebutted by the state's evidence supporting the validity of the certification process notwithstanding its disproportionate impact; it does not absolutely prove unlawful discrimination.

The charging party may also consider an additional strategy--charging discrimination in admission or retention by a particular training institution as well as by the state certifying agency.[95] This would extend the theory adopted by the EEOC in the decision discussed. Just as the state licensing agency's control of access to jobs brought its discriminatory acts within the scope of

Title VII, the allegedly discriminatory acts of a teacher training institution under a program approval or course completion form of certification would deny access to certification, which in turn would deny access to jobs. Thus, the acts of the teacher training institution form an essential part of the proscribed employment discrimination. From both a jurisdictional and a substantive perspective, this seems a sound extension of the EEOC's position.

Assuming that by one or more of these approaches the charging party can establish a prima facie case of discrimination based on disproportionate impact, the focus shifts to the efforts of respondents to justify their certification requirements. At the least, respondents will have to prove that these requirements are "job related." If respondents are held to the relatively strict standards of the EEOC's Guidelines on Employment Testing Procedures,[96] the emphasis will be on validation. The guidelines will clearly be applicable to a certification process which relies on a standardized written test and may be applicable even to program approval or course completion certification systems. The guidelines define the testing procedures to which they apply very broadly. In addition to "any paper-and-pencil or performance measure used as a basis for any employment decision,"[97] they include "all formal, scored, quantified, or standardized techniques of assessing job suitability including . . . specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements. . . ."[98]

Arguably, both the program approval and course completion approaches to certification come within this definition as "formal" or "quantified" techniques of "assessing job suitability" in the form of "specific educational . . . requirements." Assuming this to be the case, the guidelines' standards of validation would apply. A detailed discussion of these standards is beyond the scope of this paper. Suffice it to say here that the guidelines require empirical evidence of validity "based on studies employing generally accepted procedures for determining criterion-related validity,"[99] where that form of validity is feasible. Criterion-related validity is typically demonstrated by comparing test scores with one or more external variables or criteria, such as work proficiency data or supervisory ratings, to prove that the test in question does in fact accurately predict job performance. Although it is the preferred form of validation under both the EEOC Guidelines and generally accepted professional practices,[100] there is scant evidence that the courts have required employers to produce criterion-related validation to justify their racially disproportionate testing procedures.[101] That may be in part at least because employers, and especially public employers, have had substantial difficulty meeting even the less preferred and less rigorous methods of content or construct validity.[102]

Under the EEOC Guidelines, where criterion-related validation is not feasible, such as where the sample of current job-holders is too small particularly as to different races, evidence of content or construct validity may be used to justify the use of an employment test.[103] Content validity involves identifying, through an independent job analysis, the skills and knowledge needed to perform a job and then determining whether the employer's testing procedures actually reflect the requisite skills and knowledge. Construct validity attempts to evaluate the extent to which an applicant possesses some general mental and psychological characteristics considered necessary for successful performance on the job. Essential to both is a proper job analysis which surveys the relative

importance of various skills and traits involved in job performance and the degree of competency required. Absent a proper job analysis, the chances that an employer can successfully validate testing procedures are minimal.[104] Indeed, this has been a stumbling block of employers in many cases.[105]

Applying these principles to a challenge to teacher certification procedures, if the state is required to bear the burden of validating its certification procedures--whether based on a written test or program approval or course completion--it is unlikely that it will be able to do so. Indeed, it is quite probable that the state has never even sought to validate its procedures in any formal way. Thus the EEOC's conclusion in its decision involving a successful challenge to a state insurance licensing examination, that "respondent has made no attempt to validate its test in accordance with the Commission's Guidelines on Employment Testing Procedures,"[106] will almost certainly follow for most teacher certification systems. If the burden of justification can be shifted to the state, therefore, those challenging a certification system under Title VII have a good chance to prevail.

## CHALLENGES TO CERTIFICATION REQUIREMENTS BASED ON EDUCATIONAL QUALITY STANDARDS

A more innovative challenge to teacher certification statutes, and one without direct precedent,[107] focuses on the educational implications of those statutes rather than their employment consequences. The theory may be stated as follows:

1. Most states are obliged, often by state constitutional provisions,[108] to provide a certain quality of educational program to students;

2. Qualified teachers are essential for states to meet such a mandate;[109]

3. Certification is the primary mechanism by which states seek to ensure the presence of adequately qualified teachers;[110]

4. Therefore, failure of certification systems to achieve this end violates the obligation of states to provide a stated quality of education. Those injured by such a violation are the students who are compelled to attend public schools, the taxpayers, and the citizenry as a whole.

Courts in several states have found that the education clauses of state constitutions provide students and taxpayers with a basis for legal action challenging ultimately the quality of educational programs.[111] The New Jersey courts have been especially active in that regard. In Robinson v. Cahill, a landmark decision of that state's Supreme Court,[112] the court struck down the school finance system because it failed to ensure that all students would be provided with a "thorough and efficient" school system. The court said:

> The Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.[113]

The quality of teaching staff was not ignored in the discussion of what constitutes a sufficiently good educational system. The trial judge said: "The principal ingredient in good education is good teachers."[114] The New Jersey Supreme Court, in one of its many Robinson decisions, discussed the content of the constitutionally required education as including "variation in availability of qualified teachers in different areas, effectiveness in teaching methods and evaluation thereof, professionalism at every level of the system."[115] In an earlier case, that court noted:

> It goes without saying that instructional personnel are the core of every school system. General competence, motivation, dedication, and high morale are absolutely essential to proper education.[116]

Moreover, in response to the Robinson decision, the New Jersey legislature has given somewhat more substance to the constitutional requirement by enacting the Public School Education Act of 1975.[117] Section 5 of the Act[118] provides legislative guidelines to the achievement of a "thorough and efficient" educational system, and among these are the following:

> . . .
>
> c. Instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills;
>
> d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;
>
> e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;
>
> . . .
>
> g. Qualified instructional and other personnel. . . .[119]

Despite the support in legal theory for a challenge to teacher certification under a state education clause, potential litigants will be faced with difficult factual issues in their attempt to persuade a court of the necessary elements, and especially the third and fourth listed above. How can they demonstrate that certification is in fact the pivotal element in obtaining an effective teaching staff? How can they prove that the certification system has failed in fact to obtain "qualified" professional personnel?

Plaintiffs' first effort will surely be to convince the court that no empirical evidence is necessary regarding the relationship between certification and an effective teaching staff. That is a fundamental assumption, plaintiffs will argue, of the state legislature and education department as indicated by longstanding statutory and administrative policies.[120]

It is unlikely that defendants, the state education authorities, would counter by asserting that certification is unrelated to the quality of the professional staff. By doing so, they would provide a clear basis for a due process or equal protection attack on certification. But the defendants might argue that certification is related to the quality of professional personnel only in the limited sense of screening out incompetents; beyond that, decisions

bearing on the effectiveness of particular members of the pool of "competents" to carry out particular professional functions in particular school districts are properly the judgments of the local school districts. That argument has considerable appeal, especially since many advocates of reform in certification systems have pressed for more rather than less discretion in local school districts by expanding the pool of "competents." Plantiffs might, therefore, be compelled to argue that the correlation between certification and teaching quality is an inverse one; that, in the name of screening out incompetents, certification is actually screening out persons more competent to be effective teachers.

Obviously, that assertion raises complex fact questions akin to some of the issues related to the fourth element of the guidelines--that the certification system has failed to obtain professional personnel qualified to carry out the instruction necessary for a thorough and efficient educational system. In that connection, plaintiffs might argue that certification's failure in regard to teacher quality is that it is randomly, not systematically, connected; that the certification system is psychometrically invalid because it simply cannot be shown to assure that certified teachers are likely to be better on the job than uncertified teachers. This argument, too, involves complex fact questions, and the parties would surely play the lawyers' game of "switch the burden of proof." If plaintiffs can shift to defendants the burden of demonstrating the validity of the certification system, plaintiffs would stand a good chance of prevailing. A significant question, therefore, is what prima facie case of plaintiffs will suffice to shift the burden to defendants. In the racial or ethnic discrimination cases under the Equal Protection clause or under Title VII of the Civil Rights Act of 1964 discussed previously, evidence of "disproportionate impact" (and now, under at least the Equal Protection clause, of discriminatory intent) is sufficient. Where racial or ethnic discrimination is not alleged, however, plaintiffs will have to fashion their prima facie case differently. Perhaps they can do it by presenting evidence suggesting the inadequacies of the educational system traceable in some manner to professional staff; or perhaps they can present some direct but limited evidence regarding the inadequate characteristics of certified teachers.

In the former connection, plaintiffs might assert that poor pupil performance, based on standardized tests or other measurements, is sufficient evidence of teacher ineffectiveness or lack of qualification. Although there is at least some limited support for that proposition,[121] it seems more persuasive in the context of comparing the qualifications of teachers of like students than in appraising the qualifications of an entire teaching staff. For surely if the evidence suggests that pupils of low socioeconomic status perform relatively poorly, and an attempt is made to attribute this to unqualified teachers, a forceful counter-argument can be made on the basis of the multiplicity of other factors contributing to student performance.[122]

Another approach, perhaps more fruitful, is to present evidence of program inadequacy in the form of the actual or effective absence of meaningful programs to meet well-defined pupil needs. For example, the need of some students for specialized instruction--bilingual instruction or "special" education in the case of physical or psychological handicaps--is well documented; to the extent school districts in a particular state are unable to provide the necessary programs because of a lack of certified personnel, plaintiffs may successfully assert that the failure is attributable in part at least to the certification system (and the related teacher training system) for purposes of shifting the burden of justification to the state.

Plaintiffs' effort to establish a prima facie case by presenting direct evidence regarding characteristics of certified teachers which suggest that, as a group, they are insufficiently qualified to provide a "thorough and efficient" education to students would, of course, focus on different elements. At least three possibilities exist. The first involves evidence of the academic performance of certified teachers and graduates of teacher training programs as compared to other professional groups. Several studies have documented the low standing of teachers in that connection.[123] A second effort would focus on the generally poor quality of teacher training programs and their commensurately low admissions and retention practices.[124] Finally, plaintiffs could introduce evidence bearing on the personal characteristics of the certified professional staff, such as their lack of diversity and experience relevant to the needs and interests of students.

The likelihood that plaintiffs could introduce sufficient evidence, of one kind or another, to shift a substantial burden of justification to the state and that, even if they could do so, plaintiffs could successfully resist the state's effort to justify its certification system is uncertain at best. Indeed, the entire discussion of a challenge based on the state constitution's education clause is an exercise in creativity. At most, a few cases can be cited by analogy--virtually no "hard law" exists. But, as a practical matter, such a challenge may warrant serious consideration by those who believe state certification requires substantial reform and that the courts can most effectively galvanize such reform. As this paper has indicated, all signs indicate that federal constitutional bases for such a challenge are steadily being constricted. Title VII of the Civil Rights Act of 1964 still remains a distinctly possible basis for a challenge, but even its availability may be undermined.[125] Meanwhile, at least some state courts have shown a willingness to interpret their state constitutions in an aggressive manner.[126]

## CHALLENGES TO CERTIFICATION SYSTEMS BASED ON PROCEDURAL PROCESS DUE

The foregoing discussion has dealt with challenges to the substantive requirements of teacher certification laws. Such laws may also be vulnerable to challenge from a wholly different point of view, that is, procedural fairness. The Due Process clause of the Fourteenth Amendment to the U.S. Constitution requires that all state action that may deprive an individual of some significant interest in life, liberty, or property be carried out in a procedurally fair fashion. Most states also have analogous constitutional provisions. In the context of teacher certification, questions of procedural fairness arise not only in connection with the original decision to grant or deny the certificate but also in connection with subsequent decisions to revoke the certificate or to renew or upgrade it.[127]

Legal requirements as to the procedural protections that must surround decisions affecting certification have a profound effect on the permissible substantive criteria for certification. Two judicial decisions may illuminate this point. The first is Berger v. Board of Psychologist Examiners,[128] a case concerning the establishment of licensure for psychologists in the District of Columbia. The licensure statute required all prospective psychologists to possess

a master's degree in psychology. This was challenged by a psychologist who had been practicing for a period of years and who claimed that he was entitled to some alternate procedure for demonstrating his competency. The U.S. Court of Appeals ruled in his favor, holding that the statute violated procedural due process in that it conclusively presumed that a person without a master's degree was incompetent without allowing applicants an opportunity to rebut the presumption. The decision appears to be a mere aberration, resulting from the D.C. Circuit's intense distrust of the psychologists' claim to expertise;[129] but, if it were to be adopted by other courts, it would have a tremendous impact on occupational licensing, for it would require abandonment of all categorical requirements in favor of specific individualized assessment of competency.

The second case is Burton v. Cascade School District Union High School No. 5,[130] a case in which a dismissed teacher successfully challenged his dismissal on grounds that the provision of the tenure statute permitting dismissal on grounds of "immorality" was so vague as not to inform him of the standard of conduct to which he would be held.[131] This holding, too, appears to be aberrant[132] but, if widely adopted, would render unconstitutional virtually all existing teacher certification laws that prescribe some standard of personal fitness. It would also bar states from making "incompetence" or "inefficiency" a ground for revocation or nonrenewal of licenses without some further specification of the quality of teacher effectiveness required.[133]

To be able to invoke the protection of the Due Process clause, a teacher or prospective teacher must be able to show the risk of injury to some life, liberty, or property interest protected by the Constitution. The mere prospect of obtaining a particular government job is not such an interest, but preclusion from employment in a whole field of endeavor, such as public school teaching, has been held to be such.[134] Once it is established that a protected interest is at stake, it must be determined exactly what type of fair procedure is constitutionally required, balancing the competing interests of the government and the individual.[135] Due process is a flexible, sometimes elusive, concept that varies in application from situation to situation. Although courts, when faced with problems of procedural due process, tend to think in terms of the procedural elements of a judicial or quasi-judicial hearing, such a formal procedure is not always called for.[136]

At the stage of the initial application for certification (or for a higher level of certification), it is clear that the prospective teacher must be given reasonably clear notice of the criteria for grant of certification;[137] and, at least where certification may be denied on the basis of personal factors--such as moral character--that may be subject to dispute, the prospective teacher must be given a full hearing with an opportunity to present evidence and to cross-examine adverse witnesses.[138] It might be argued that, given the danger of discriminatory impact, cultural bias, or erroneous subjective judgment, this right to a hearing ought to extend to any grounds on which a prospective teacher might be denied certification. Thus far, however, courts have been unwilling to grant such a right routinely or even to allow applicants routinely to see graded examination papers where passing an examination is required for licensure.[139]

Likewise when a license is revoked for cause before it expires, the teacher is entitled to a full hearing, including the right to cross-examine adverse witnesses;[140] although where state law makes revocation mandatory on the

occurrence of some objective and indisputable event, such as conviction for a felony, such hearing is probably not required.[141]

The question of what procedure is required for renewal of certification has been little explored. It is clear, for example, that at the stage of initial application, the state can demand that the applicant affirmatively prove fitness and capacity.[142] Can the same be required at the renewal stage, or must the burden fall on the state to demonstrate lack of fitness or capacity? Recent U.S. Supreme Court decisions, which emphasize that the property right public employees have in their job is conditioned by the procedural rights (or lack thereof) granted them by state law,[143] suggest that teacher certification laws could constitutionally be written to require the teacher to demonstrate fitness and capacity affirmatively at each renewal.

## REMEDYING UNLAWFUL CERTIFICATION PRACTICES

If, by one of the legal theories suggested in this paper, a state's certification process can successfully be challenged, there still remains the difficult matter of developing an appropriate remedy. It is a truism of the law that for every legally cognizable harm there is a remedy. Moreover, the remedy must be calculated to respond to and undo or compensate for the harm.

The remedy which a court might impose in a successful challenge to a state certification system will depend, therefore, on the theories relied upon by plaintiffs. Nonetheless, some general principles can be advanced.

In prior cases of discriminatory or otherwise invalid selection or employment practices, especially in the public sector, courts have barred the use of the unlawful test or other employment practice;[144] have permitted its use only in modified form;[145] or have required the use of a different system on an interim basis pending development of a new permanent system.[146] In cases involving racial or ethnic discrimination, courts have often ordered the hiring of and back pay for individuals who were themselves discriminated against;[147] some courts have also imposed general affirmative, or "preferential," hiring requirements on the employer.[148]

This last remedial practice clearly has been the most controversial and recently has prompted an appreciable judicial backlash.[149] The U.S. Supreme Court may go a long way toward resolving the federal constitutional issues in a case it will be hearing this term--Bakke v. Regents of the University of California.[150] In that case, the California Supreme Court invalidated the special minority admissions program at a University of California medical school on the ground that the racial preference constituted unlawful "reverse discrimination." Although the Bakke case involves a student admissions program in a professional school, its resolution is likely to have great influence on the remedial process available in employment cases.

The application of these remedial principles to a successful challenge to a state teacher certification system suggests that a variety of remedies may be ordered but that a court would likely stop short, at least pending the Bakke decision, of any form of preferential certification. That means a court might prohibit the use of an invalid certification system; permit its continued

operation with judicially approved modifications or pending the availability of a new system; require the development and implementation of an interim system. To the extent, under any of these alternatives, that a new system must be developed, it is quite likely the court will play a supervisory role as part of its continuing jurisdiction over the case.[151] This, of course, raises the educator's fabled spectre of a court functioning as a "super-certification agency." On the other hand, a court's unwillingness to assume this responsibility may consign the challenge to the category of a Pyrrhic victory.

The case of Chance v. Board of Examiners[152] illustrates the dilemma. There, a successful challenge to the way in which the New York City school district licenses supervisory personnel set in motion a long struggle which is still in progress. During its course, the court became heavily involved not only in detailed licensure questions[153] but in many other aspects of the school district's personnel practices.[154] Yet out of the protracted litigation may conceivably come a new and far preferable licensure system.[155] That is the hope of those who bring this type of litigation and who try to persuade judges to undertake the concededly difficult task of fashioning and enforcing meaningful remedies.

## CONCLUSION

This paper has sought to evaluate the various possible legal challenges that might be made to existing teacher certification systems. It is a brief neither for nor against such challenges. Rather, it has started with the assumption that pressure for reform is likely to eventuate in court action, even though there are indications that the judiciary may no longer be as hospitable to such challenges as it once was. Indeed, analysis of the available legal theories leaves one with the distinct sense that, absent dramatic and unusual facts, such as direct evidence of racially discriminatory intent or research demonstrating that certain criteria for certification are negatively correlated with teacher effectiveness, the courts are likely to play only a very limited role in efforts to reform teacher certification practices.

The federal courts, taking their direction from the U.S. Supreme Court itself, have reemphasized their deference to notions of state sovereignty and legislative discretion, both of which make state teacher certification systems less vulnerable to judicial attack on the basis of irrationality under the Due Process and Equal Protection clauses than they might once have been. In the area of racial discrimination, the federal courts have retreated from the principle that under the Equal Protection clause proof of discriminatory impact, as opposed to intent, is sufficient to establish a violation of law, thus raising an additional barrier to litigation based upon that theory. While the federal courts remain open to allegations of violation of procedural due process, the potential impact of such litigation on present teacher certification practices remains uncertain at best.

Title VII of the Civil Rights Act of 1964 appears to be the promising vehicle for intervention by the federal courts into teacher certification issues, but its application to this area involves both difficult matters of proof and a number of open questions of law.

Perhaps the most interesting possibilities for litigation concerning teacher certification practices are those involving challenges in the state courts and relying upon state constitutional provisions. It must be recognized, however, that such litigation is likely to involve novel and unprecedented questions of law, which most state courts can be expected to consider reluctantly and then only in a very gingerly manner.

Finally, even if a state or federal court adopts one of the theories discussed in this paper, and the plaintiffs succeed in providing the requisite factual proofs, the complex problems of remedy remain.

In sum, while there are sufficient theoretical avenues open for legal challenges to existing teacher certification systems to make law reform litigation a distinct possibility, the prospects that courts will actually strike many of those systems does not appear to be very great.

NOTES

1 See, for example: Study Commission on Undergraduate Education and Education of Teachers. Teacher Education in the United States: The Responsibility Gap. Lincoln, Neb.: University of Nebraska Press, 1976.

2 A number of large cities, including Wilmington, Chicago, Baltimore, Buffalo, and New York, do issue teacher certificates. See: T.M. Stinnett. "Teacher Education, Certification, and Accreditation," in 2 Education in the States: Nationwide Developments Since 1900, E. Fuller and J. Pearson, eds. Washington, D.C.: National Education Association, 1969, pp. 381, 415. Vermont also permits local school districts to issue initial teaching certificates.

The federal government plays no direct role in teacher certification. The U.S. Office of Education does encourage and facilitate the development of interstate reciprocity agreements. Federal aid to education programs may also indirectly mandate certain minimum requirements for teacher preparation. See, for example, the provisions of Title I, Elementary and Secondary Education Act, 20 U.S.C. Sec. 241e (a) (12), and of the Education of All Handicapped Children Act, 20 U.S.C. Sec. 1413 (a) (13).

3 Certification requirements of the various states are compiled in: T.M. Stinnett. A Manual of Standards Affecting School Personnel in the United States. Washington, D.C.: National Education Association, 1974; and E. Woellner. Requirements for Certification for Elementary Schools, Secondary Schools, Junior Colleges. Chicago: University of Chicago Press, 1976.

4 Accounts of the history and development of teacher certification in the United States may be found in T.M. Stinnett, "Teacher Education," op. cit., pp. 383-414, and in: L. Kinney. Certification in Education. Englewood Cliffs, N.J.: Prentice-Hall, 1964.

5 As of 1974, only Missouri, Nevada, North Dakota, South Dakota, and the District of Columbia did not use the program approval approach at least in part.

6 The exact number of states that have incorporated CBTE criteria into their program approval standards is a matter of dispute. Different commentators, interpreting data collected in 1973, have put the figure at anywhere between 11 and 20. See: John G. Merrow. Politics of Competence: A Review of Competency-Based Teacher Education. Washington, D.C.: National Institute of Education, 1975, p. 13; Allen A. Schmeider. Competency-Based Education: The State of the Scene. Washington, D.C.: American Association of Colleges for Teacher Education, 1973; A.P. Wilson and W.W. Curtis. "The States Mandate Performance-Based Teacher Education," Phi Delta Kappan 54 (2): 76; October 1973; M.G. Villeme. "Competency-Based Certification: A New Reality," Educational Leadership 31 (4): 348-49; January 1974.

7 See, for example: Stanley Elam. Performance-Based Teacher Education: What Is the State of the Art? Washington, D.C.: American Association of Colleges for Teacher Education, 1971.

8 The efforts of a number of states to incorporate CBTE criteria into their program approval standards are described in John G. Merrow, op. cit., pp. 21-23, 25-30.

9 M.G. Villeme. "The Decline of Competency-Based Teacher Certification," Phi Delta Kappan 56 (5): 428-29; January 1977. Efforts to develop the research base necessary to identify relevant teacher skills or competencies have been launched under the aegis of the National Commission on Performance-Based Education, an entity originated by the Educational Testing Service.

10 United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975); see also Georgia Association of Educators v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976). Legal materials referred to in this paper are cited in conformity with the standard format set out in: Harvard Law Review Association. Uniform System of Citations, 12th ed. Cambridge, Mass.: Harvard Law Review Association, 1976. The texts of judicial opinions may be found in the various systems of state and federal reports. Federal cases are reported as follows: Supreme Court--U.S. Reports (U.S.); Court of Appeals--Federal Reporter (F. and F.2d); District Court--Federal Supplement (F. Supp.). State cases are generally reported in the official state reports (state name abbreviated) and in one of the unofficial regional reports published by the West Publishing Company (abbreviated by region, for example, N.E., S.W.). The standard format for case citations is as follows: United States [plaintiff] v. North Carolina [defendant], 400 [volume number] F. Supp. [reporter] 343 [page number] (E.D.N.C. [further specifications of court, where the name of the reporter does not identify it unambiguously; here, U.S. District Court for the Eastern District of North Carolina] 1975 [year of decision]). The subsequent history of the case on appeal, for example reversal (rev'd), affirmance (aff'd), modification (mod.), denial of discretionary review (cert. denied) is indicated, where relevant, by a similar citation. More detailed explanation of legal citation format and of locating and using legal research materials may be found in any standard text on legal research, such as: Morris Cohen. Legal Research in a Nutshell. St. Paul, Minn.: West Publishing Co., 1971.

11 M.G. Villeme, "The Decline of Competency-Based Teacher Certification," op. cit., pp. 428-29; T.M. Stinnett, Manual of Standards, op. cit., pp. 28-33.

12 See generally: Georgia Teaching Field Criterion-Referenced Tests. Atlanta: Georgia Department of Education, n.d.

13 According to T.M. Stinnett ("Teacher Education," op. cit., p. 415), 27 states issue lifetime certificates. Many of these states, however, do not make the initial certificate a lifetime certificate.

14 Developments in this area are summarized in tabular form in Stinnett, Manual of Standards, op. cit., pp. 28-33.

15 Laws mandating inservice teaching training are collected in: H. Geffert, R. Harper, and D. Schember. State Legislation Affecting In-Service Staff Development. Washington, D.C.: Lawyers Committee for Civil Rights Under Law, 1976.

16 U.S. Const. amend. XIV, Sec. 1.

17 Applications of principles of procedural due process are discussed on pp.131 ff.

18 The earliest case adopting this interpretation of the Due Process Clause was Mugler v. Kansas, 123 U.S. 623 (1887). The most notorious was Lochner v. New York, 198 U.S. (1905), striking down maximum hours legislation.

19 The watershed case was West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

20 See, for example, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963).

21 New State Ice Co. v. Lieberman, 285 U.S. 262 (1931) (ice dealers); Louis K. Liggett Co. v. Baldridge, 279 U.S. 105 (1928) (owners of pharmacies).

22 129 U.S. 114 (1881).

23 Ibid., pp. 114-15.

24 See cases cited in note 21.

25 353 U.S. 732 (1957).

26 For example, Erb v. Iowa State Board of Public Instruction, 216 N.W. 2d 339 (Iowa Sup. Ct. 1974) (adultery); Morrison v. State Bd. of Education, 1 Cal. 3d 214, 461 P.2d 375 (1969) (private homosexual conduct). These decisions reject the view that a teacher is an exemplar for his or her students and so must in every way be above reproach. Other courts faced with similar situations have found the "exemplar" analysis sufficiently rational to withstand constitutional attack. See, for example, Pettit v. State Bd. of Education, 10 Cal. 3d 249, 513 P.2d 889 (1973) (self-declared "swinger"); Anonymous v. Bd. of Examiners of New York City, 65 Misc. 2d 581,318 N.Y.S. 2d 163 (Sup. Ct., Spec. Term 1970) (participation in methadone maintenance program).

27 Guthrie v. Taylor, 279 N.C. 703, 185 S.E. 2d 193 (1971); Turetsky v. Allen, 59 Misc. 2d 845, 301 N.Y.S. 2d 890 (Sup. Ct., Spec. Term 1968). But compare Berger v. Bd. of Psychologist Examiners, 521 F. 2d 1056 (D.C. Cir. 1975) discussed on pp. 131 ff.

28 See, generally: "Developments--Equal Protection," Harvard Law Review 82: 1065; 1969.

29 The most explicit statement of the two-tiered standard is contained in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973) (Marshall, J., dissenting).

30 See, for example: Ibid., pp. 98-110; and G. Gunther. "The Supreme Court, 1971 Term--Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection," Harvard Law Review 86 (1): 1; 1972.

31 Craig v. Boren, 97 S. Ct. 451 (1976).

32 Compare Mathews v. Lucas, 96 S. Ct. 2755 (1976) with Jimenez v. Weinberger, 417 U.S. 628 (1974). These cases bracket some standard of review less demanding than the strictest scrutiny but more demanding than mere rational relationship.

33 See, for example, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972).

34 347 U.S. 483 (1954).

35 The Court declared: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms" (Ibid., p. 403).

36 It should be noted that this involves a claim of improper discrimination between classes of prospective teachers (that is, between those who can meet the certification criteria and those who cannot) which is alleged to be unconstitutional because of its impact on the fundamental rights of students. It is not self-evident that teachers would have been permitted to assert the rights of students in this fashion. A suggestive analogy, however, might have been drawn to cases involving qualifications for elective public office. There is no fundamental right to hold or run for public office; there is a fundamental right to vote. The Supreme Court has applied strict judicial scrutiny to state statutes placing limits on who may seek elective office where it could be shown that those limits had an impact on the voters' right to cast a meaningful vote. See, for example, Bullock v. Carter, 405 U.S. 134 (1972).

37 An analogous problem was considered in Hunnicutt v. Burge, 356 F. Supp. 1227 (M.D. Ga. 1973). There the court found that a historically black teacher college which had traditionally sent its graduates to black public schools provided a much poorer education than other colleges in Georgia's state teacher college system. Declaring that this violated the rights of the students whom the graduates of the college would teach, the court ordered the state to equalize the quality of the colleges. The racial nexus, however, was obviously crucial to this outcome.

38 411 U.S. 1 (1973).

39 Ibid., pp. 31-39.

40 Ibid., p. 56.

41 Recent decisions have, for example, stricken down professional licensure laws that discriminated on the basis of alienage or national origin: Examining Bd. of Engineers v. Flores de Otero, 96 S. Ct. 2204 (1976) (civil engineers); In re Griffiths, 413 U.S. 717 (1973) (lawyers). The critical importance in litigation under the Equal Protection clause of inducing the courts to apply "strict scrutiny" rather than the "rational relationship test" may be seen by comparing these cases with New Orleans v. Dukes, 96 S. Ct. 2513 (1976) (street vendors) and Williamson Lee Optical Co., 348 U.S. 483 (1955) (opticians), cases in which the Court applied the rational relationship test and upheld the licensure statute. Dukes is an especially remarkable case because, despite the fact that the undisguised intent of New Orleans was to give a single vendor a monopoly in the Vieux Carre section, the Court was prepared to hunt for an acceptable rationale, real or imaginary.

Possible challenges to teacher certification laws as embodying "invidious" classifications are discussed in greater detail in the text.

42 461 F. 2d 276 (5th Cir. 1972).

43 Ibid., p. 279.

44 Ibid., p. 280.

45 517 F. 2d 1089 (5th Cir. 1975), cert. denied, 96 S. Ct. 2660 (1976).

46 Ibid., p. 1102. Vickery was followed, without detailed discussion, in a later case upholding the Alabama bar examination. Parrish v. Bd. of Comm'rs of Alabama State Bar, 533 F. 2d 942 (5th Cir. 1976). Accord, Richardson v. McFadden, 540 F. 2d 744 (4th Cir. 1970).

47 407 F. Supp. 1102 (N.D. Ga. 1976).

48 State constitutional provisions analogous to the Due Process and Equal Protection clauses are canvassed and analyzed in "Note, Toward an Activist Role for State Bills of Rights," Harvard Civil Rights--Civil Liberties Law Review 8 (3): 271; 1971. But compare: H. Linde. "Without Due Process: Unconstitutional Law in Oregon," Oregon Law Review 49 (2): 125; 1970.

49 This point has on occasion been expressly noted by the U.S. Supreme Court itself; for example, Oregon v. Haas, 95 S. Ct. 1215, 1219 (1975).

50 In most states, the task of formulating criteria for teacher certification has been delegated by the state legislature to the state board of education or some other administrative agency. While the federal courts have in the past accorded policy judgments of administrative bodies the same degree of deference as those of legislatures, there are some signs that this is changing. See, for example, General Electric Co. v. Gilbert, 97 S. Ct. 401 (1976); Hampton v. Mow Sun Wong, 96 S. Ct. 1895 (1976).

51 The New Jersey Supreme Court relied upon this analysis in choosing not to follow the Rodriguez decision in interpreting its own analogue of the Equal Protection clause: Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273, cert. denied, 414 U.S. 976 (1973).

52 See, for example, "Comment, Substantive Due Process in the States Revisited," Ohio State Law Review 18 (3): 384; 1958; and Morrad G. Paulson. "The Persistence of Substantive Due Process in the States," Minnesota Law Review 34 (2): 91; 1950.

53 For example, Isakson v. Rickery, 550 P. 2d 359 (Alaska Sup. Ct. 1976); Robinson v. Cahill, op. cit.

54 See, for example, Michigan v. Mosely, 96 S. Ct. 321, 334 (1975) (Brennan, J., dissenting); W. Brennan. "State Constitutions and the Protection of Individual Rights," Harvard Law Review 90 (3): 489, 499-501; 1977 (citing cases).

55 31 Conn. Super. 377, 332 A. 2d 813 (1974).

56 U.S. Office of Education, Department of Health, Education, and Welfare. State Constitutional Provisions and Selected Legal Materials Relating to Public School Finance. Washington, D.C.: U.S. Government Printing Office, 1973. pp. 4-7.

57 U.S. Const. amend. XIV, Sec. 1. As previously discussed, most state constitutions have provisions which are literal counterparts or which have been constructed by the state courts to afford comparable protection.

58 42 U.S.C. Secs. 2000e et seq. (Supp. II, 1972). Additional federal statutory and regulatory protections may be available depending upon federal funding patterns. See, for example, Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d (1970); Emergency Employment Act of 1971, Sec. 12(g), 42 U.S.C. Sec. 4881(g) (Supp. I, 1971); State and Local Fiscal Assistance Act of 1972 (Revenue Sharing Act), 31 U.S.C. Sec. 1242 (Supp. II, 1972); 45 C.F.R. Sec. 70.4 (1970).

59 Public employment was brought within Title VII's coverage by 1972 amendments to the statute. Act of March 24, 1972, P.L. 92-261, Title VII, 86 Stat. 103, 42 U.S.C. Sec. 2000e(f).

60 426 U.S. 299 (1976).

61 For example, see: Chance v. Board of Examiners, 458 F. 2d 1167, 1176-77 (2d Cir. 1972); Castro v. Beecher, 459 F. 2d 725, 732-33 (1st Cir. 1972); Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F. 2d 1333, 1337 (2d Cir. 1973); Douglas v. Hampton, 168 U.S. App. D.C. 62, 67, 512 F. 2d 976, 981 (D.C. Cir. 1975).

62 Guidelines on Employer Selection Procedures, 29 C.F.R. pt. 1607 (1975).

63 See, for example: Albermarle Paper Co v. Moody, 422 U.S. 405, 431 (1975); Douglas v. Hampton, 512 F. 2d 976, 984 (D.C. Cir. 1975); Vulcan Society v. Civil Service Commission, 490 F. 2d 387 (2d Cir. 1973).

64 426 U.S. at 247-48.

65 Ibid., p. 254.

66 An even more recent U.S. Supreme Court decision, Village of Arlington Heights v. Metropolitan Housing Development Corp., 97 S. Ct. 555 (1977), involving a claim that local authorities' refusal to change the zoning of a tract of land from single-family to multi-family was racially discriminatory, shed some further light on the Court's view. Citing Washington v. Davis, the Court reaffirmed that discriminatory intent or purpose must be a "motivating factor" in order to prove a violation of the Equal Protection clause (p. 563). The Court said: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstances and direct evidence of intent as may be available" (p. 564). Evidence of discriminatory impact provides "an important starting point," and if there is "a clear pattern, unexplainable on grounds other than race," that evidence alone may suffice to prove discriminatory intent. But, the Court warned, absent such a stark pattern, "impact alone is not determinative, and the Court must look to other evidence." Indeed, in a footnote to this warning the Court said: "In many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity' of the nation's population" (p. 564, n. 15). In a later footnote the Court made the plaintiffs' burden even more difficult when it indicated that even if there was proof that the defendants were motivated in part by a racially discriminatory purpose the result would not be invalidation of the challenged action; rather defendants would then have the burden of establishing that the same action would have been taken "even had the impermissible purpose not been considered" (p. 566, n. 21).

67 The written test, "Test 21," was developed by the U.S. Civil Service Commission to evaluate verbal ability, vocabulary, reading, and comprehension throughout the federal service.

68 426 U.S. at 250-52.

69 Ibid., pp. 262-63.

70 401 U.S. 424 (1971).

71 The U.S. Supreme Court recently reinforced the suspicion that it might be considering a further dilution of Title VII standards when it agreed to hear a case which arises from the issue of whether, absent proof of discriminatory intent, Congress can prohibit by Title VII certain employment practices of a public agency: Hazelwood School District v. United States, 534 F. 2d 805 (8th Cir. 1976), cert. granted, 45 U.S.L.W. 3454 (U.S. Jan. 11, 1977).

72 Many state constitutions contain a "civil service" provision which mandates selection of public employees on the basis of "merit and fitness," to be determined "to the extent practical" by an examination process. Again, "to the extent practical," that examination must be "competitive" (that is, resulting in a ranked list of acceptable candidates). See, for example, N.Y. Const. art. 5, section 6 (1894).

73 Under the laws governing delegations of authority, however, the delegator, usually state education authorities or the legislature in the case of teacher certification, remains ultimately responsible for the actions of the delegatee, the teacher training institution.

74 For example, Chance v. Board of Examiners, 458 F. 2d 1167 (2d Cir. 1972).

75 See: Georgia Ass'n of Educators v. Nix and U.S. v. North Carolina, cited in note 10.

76 29 C.F.R. Secs. 1601.1 et seq. (Supp. 1976) (procedural regulations of the EEOC).

77 42 U.S.C. Sec. 2000e-2(a) (1) (1974).

78 Ibid., Sec. 2000e-2(a) (2).

79 Ibid., Sec. 2000e(b).

80 EEOC Dec. No. 75-249 (May 6, 1975), 2 CCH Employment Practices, paragraph 6457, at p. 4207.

81 Ibid., p. 4208.

82 Ibid. The cases from which the EEOC derived this view of Title VII were Sibley Memorial Hospital v. Wilson, 488 F. 2d 1338 (D.C. Cir. 1973), and Puntolillo v. New Hampshire Racing Commission, 375 F. Supp. 1089 (D. N.H. 1974). In Sibley, a private hospital which served as a "broker" between patients and private duty nurses but was not the employer of the nurses nonetheless came within Title VII's coverage. Similarly, in Puntolillo the state racing commission, which controlled licensing of and stall space for driver-trainers of harness horses, was an "employer" within the meaning of Title VII.

83 Ibid.

84 Ibid.

85 Ibid., p. 4209.

86 Ibid.

87 Ibid.

88 For example, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

89 See, for example, Chance v. Board of Examiners, 330 F. Supp. 203, 209 (S.D.N.Y. 1971), aff'd, 458 F. 2d 1167 (2d Cir. 1972), where the district court ordered the Board of Examiners to conduct an extensive survey.

90 Ibid. The Chance case, decided on Equal Protection grounds, is highly significant to this paper since it invalidated the licensing system used in the New York City school district for supervisory personnel on the ground that it was racially discriminatory. That licensing system, relying heavily on a written test, has been comparable to many state certification procedures. Now, however, not only has the Chance decision required restructuring of the supervisory licenses, but the teacher licensing portion is being challenged in court on similar grounds, in Rubinos v. Board of Examiners, Civil No. 74-2240 (S.D.N.Y., filed May 24, 1974).

91 41 Fed. Reg. 51752 (1976).

92 Ibid. at 51753.

93 2 CCH Employment Practices, paragraph 6457 at p. 4208.

94 On the other hand, if there were no statutory basis for the responsible public agency to delegate effective power over certification to public and private teacher training institutions or inadequate guidelines for the discharge of the delegated powers, the certification system might be attacked as an improper delegation of authority.

95 The charging party might also seek to have joined as a respondent a school district which refused to hire the charging party because of his or her lack of certification. This would be analogous to joining the insurance company in the EEOC decision. Indeed, from a jurisdictional point of view, it might be helpful to include a potential employer.

96 EEOC Guidelines on Employment Testing Procedures, 29 C.F.R. Sec. 1607 (1970), republished at 41 Fed. Reg. 51984 (1976).

97 Ibid. at Sec. 1607.2.

98 Ibid.

99 Ibid. at Sec. 1607.5(a).

100 See, for example: American Psychological Association. Standards for Educational and Psychological Tests and Manuals. Washington, D.C.: the Association, 1974.

101 Compare Vulcan Society v. Civil Service Commission, 360 F. Supp. 1265 (S.D.N.Y. 1973), aff'd, 490 F. 2d 387 (2d Cir. 1973) [failure to use criterion-related validation not fatal when test may be shown to be job related by another method] with U.S. v. Enterprise Ass'n, 360 F. Supp. 979 (S.D.N.Y. 1973), remanded for mod. & aff'd, 501 F. 2d 622 (2d Cir. 1974) [differential impact unjustified where test was not validated by the criterion-related method although there was some evidence of construct validity].

102 See, for example, Chance v. Board of Examiners, 330 F. Supp. 203, 216-223 (S.D.N.Y. 1971), aff'd, 458 F. 2d 1167 (2d Cir. 1972), where the trial court discussed these issues at length.

103 EEOC Guidelines, op. cit., at Sec. 1607.5(a).

104 Albermarle Paper Co. v. Moody, 422 U.S. 407 (1975).

105 See, for example, Chance v. Board of Examiners, op. cit., p. 216.

106 2 CCH Employment Practices, op. cit., paragraph 6458 at pp. 4210-11.

107 In Hunnicutt v. Burge, discussed in note 37, the court considered a somewhat related issue. It found that a historically black state teachers' college was providing a much poorer education than other teachers' colleges in Georgia and that this violated the Equal Protection rights of public school students who were taught by those less qualified, albeit certified, teachers.

108 See, for example, N.J. Const. Art. VIII, section 4, paragraph 1 (1947).

109 It is virtually unquestioned educational dogma that effective teaching is necessary for quality education to take place.

110 As indicated previously, every state has a system of teacher certification in operation.

111 See, for example: Robinson v. Cahill, 118 N.J. Super. 223, 287 A. 2d 187 (Law Div. 1972), suppl. op., 119 N.J. Super. 40, 289 A. 2d 569 (Law Div. 1972), aff'd, 62 N.J. 473, 303 A. 2d 273 (1973); Horton v. Meskill, 31 Conn. Super. 377, 332 A. 2d 113 (1974). Challenges ultimately to the quality of educational programs have also proceeded on other grounds; see Lau v. Nichols, 483 F. 2d 791 (9th Cir. 1973), rev'd, 414 U.S. 563 (1974) [Title VI of the Civil Rights Act]; and Serna v. Portales, 351 F. Supp. 1279 (D.N.M. 1972) [Equal Protection clause]. Both these cases, in part at

least, involved successful claims that non-English-speaking students were being denied appropriate educational opportunities because of their language difficulties. A significant reason for the inadequacy of bilingual educational programs may be the shortage of qualified teaching personnel; that shortage may be traceable, in turn, to state certification systems. See: P. Tractenberg. Testing the Teacher. New York: Agathon, 1973. pp. 149-54.

112 62 N.J. 473, 303 A. 2d 273 (1973).

113 62 N.J. at 515, 303 A. 2d at 295.

114 118 N.J. Super. at 249, 287 A. 2d at 200.

115 69 N.J. 133, 141, 351 A. 2d 713, 717 (1975).

116 Board of Educ. of Elizabeth v. City Council of Elizabeth, 55 N.J. 501, 508-509, 262 A. 2d 881, 885 (1970).

117 L. 1975, c. 212, codified as N.J.S.A. 18A:7A-1 et seq.

118 N.J.S.A. 18A:7A-5.

119 The last of these legislative guidelines bears quite directly on the teacher certification process; the prior three do so indirectly, focusing on program quality. Significantly, the State Board of Education's implementing regulations pick up the theme of teacher quality in relationship to a "thorough and efficient" educational system. They require the public schools of New Jersey to provide "teaching staff members of high quality" [N.J.A.C. 6:8-2.1(c) (8) (1976)].

120 See, for example, N.J.S.A. 18A:26-1 et seq.

121 In Scheelhaase v. Woodbury Central Community School District, 488 F. 2d 237 (8th Cir. 1973), cert. denied, 417 U.S. 969 (1973), the federal courts, including the U.S. Supreme Court, refused to overturn the action of a school board which dismissed a teacher, in part at least, because her students performed less well on standardized tests than did other students of the same grade level.

122 See, for example: J. Coleman. Equality of Educational Opportunity Survey. Washington, D.C.: U.S. Office of Education, 1966; C. Jencks. Inequality: A Reassessment of the Effect of Family and Schooling in America. New York: Basic Books, 1972. See generally: F. Mosteller and D. Moynihan, eds. On Equality of Educational Opportunity. New York: Random House, 1972.

123 See, for example: J. Koerner. Miseducation of American Teachers. Boston, Mass.: Houghton Mifflin, 1963.

124 Ibid.

125 See prior discussion of Hazelwood School Dist. v. U.S., 534 F. 2d 805 (8th Cir. 1976), cert. granted, 45 U.S.L.W. 3454 (Jan. 11, 1977).

126 Serrano v. Priest, 557 P. 2d 929 (1977); Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273 (1973); Horton v. Meskill, 31 Conn. Super. 377, 332 A. 2d 113 (1974).

127 See generally: In re Ruffalo, 390 U.S. 544 (1968) (revocation of license); Willner v. Comm. on Character and Fitness, 373 U.S. 96 (1963) (denial of license); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926) (same).

128 521 F. 2d 1056 (D.C. Cir. 1975).

129 The court characterized psychology as "an amorphous, inexact, and even mysterious discipline" without an established "corpus of knowledge" that can be acquired by graduate study (521 F. 2d at 1061). The "irrebuttable presumption" doctrine, if carried to its logical consequences, renders all statutory classifications unconstitutional [Cleveland Bd. of Education v. LaFleur, 414 U.S. 632, 657-60 (1974) (Rehnquist, J., dissenting)]. As a result, it was largely abandoned by the Supreme Court in Weinberger v. Salfi, 95 S. Ct. 2457 (1975), a case conspicuous by its absence from the Court's analysis in Berger. The practice of requiring present practitioners to meet newly imposed licensure requirements has been upheld on numerous occasions. For example: Rasulis v. Weinberger, 502 F. 2d 1006 (7th Cir. 1974) (physical therapists); Milnor v. Burson, 320 F. Supp. 706 (N.D. Ga. 1970) (driver training instructors).

130 353 F. Supp. 254 (D. Ore. 1973), appeal dismissed as untimely filed, 512 F. 2d 850 (9th Cir.), cert. denied, 96 S. Ct. 69 (1975).

131 "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process" [Connelly v. General Construction Co., 269 U.S. 391 (1925)].

132 The Supreme Court has been reluctant to hold that members of an identifiable occupation or profession are not aware of the standards of conduct generally expected of members of that occupation or profession without their being set out in great detail. In re Ruffalo, 390 U.S. 544, 555 (1968) (White, J., concurring); compare Parker v. Levy, 417 U.S. 733 (1974).

133 In general, the courts have not been troubled by the vagueness of the terms "incompetence" and "inefficiency" when they have been called upon to construe them in teacher tenure statutes. See generally: D. Rosenberger and R. Plimpton. "Teacher Incompetence and the Courts," Journal of Law and Education 4 (4): 469; 1975; and Annot., "What Constitutes 'Incompetence' or 'Inefficiency' as a Ground for Dismissal or Demotion of a Public School Teacher," 4 A.L.R. 3d 1090 (1965).

134 Willner v. Comm. on Character and Fitness, 373 U.S. 96 (1963); Bd. of Regents v. Roth, 408 U.S. 564, 573-74 (1972); Pordum v. Bd. of Regents, 491 F. 2d 1281 (2d Cir. 1974).

135 See, generally, Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

136 See, generally: H. Friendly. "'Some Kind of Hearing,'" University of Pennsylvania Law Review 134 (6): 1267; 1975.

137 Konigsberg v. State Bar, 353 U.S. 252 (1957). Some state courts have reached a similar conclusion based on state constitutional provisions that require public employees to be hired on merit. For example: Gassner v. Bd. of Examiners of the City of New York, 27 App. Div. 2d 662, 277 N.Y. Supp. 2d 822 (1967) (there must be some ascertainable standard made known to the applicant). In Lubell v. Nyquist, 31 App. Div. 2d 569, 294 N.Y. Supp. 2d 961 (1968), leave to appeal denied, 23 N.Y. 2d 645 (1969), this argument was extended, the court holding that where the requirements for certification included a practicum, the prospective teacher had been denied his rights when he was told that he would be working with a class of average ability but in fact was given a class of below-average ability.

138 Willner v. Comm. on Character and Fitness, 373 U.S. 96 (1963); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926).

139 Tyler v. Vickery, 417 F. 2d 1089 (5th Cir.), cert. denied, 96 S. Ct. 2660 (1975); Whitfield v. Illinois Bd. of Law Examiners, 504 F. 2d 474 (7th Cir. 1974); but compare Richardson v. McFadden, 540 F. 2d 744 (4th Cir. 1976). These decisions, however, relied heavily on the fact that the applicant had an unlimited right to retake the examination. See, generally: "Comment, Review of Failing Bar Examinations: Does Reexamination Satisfy Due Process," Boston University Law Review 52 (spec. ed.): 286; 1974. If that were not so, they might have come out differently.

Prospective teachers have been granted the right to see and challenge graded exam papers in New York under the provisions of the state constitution [Schwartz v. Bogen, 28 App. Div. 2d 692, 281 N.Y. Supp. 2d 279 (1967), modified on other grounds, 21 N.Y. 2d 1020, 238 N.E. 2d 496 (1968)].

Given the predominance of the approved program approach, the right to examine and challenge undergraduate records and faculty recommendations is probably of more practical importance than any right to challenge teacher certification examinations. These rights have been established by the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. Sec. 1232g, popularly known as the Buckley Amendment.

140 In re Ruffalo, 390 U.S. 544 (1968); Mack v. Florida State Bd. of Dentistry, 430 F. 2d 862 (5th Cir. 1970).

141 See, for example, DiGenova v. State Bd. of Education, 45 Cal. 2d 255, 288 P. 2d 862 (1955).

142 Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

143 Bishop v. Wood, 96 S. Ct. 2074 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion per Rehnquist, J.).

144 See, for example: Castro v. Beecher, 334 F. Supp. 930, clarified, 334 F. Supp. 947, judgment modified, 334 F. Supp. 950 (D. Mass. 1971), aff'd in part, rev'd in part, op. modified, remanded, 459 F. 2d 725 (1st Cir. 1972); Western Addition Community Org. v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971), prelim. inj. granted, 340 F. Supp. 1351 (N.D. Cal. 1972).

145 For example, Carter v. Gallagher, 3 FEP Cases 692 (D. Minn. 1971), aff'd in pertinent part, 452 F. 2d 315 (8th Cir. 1971), aff'd in pertinent part en banc, 452 F. 2d 327 (8th Cir. 1972), cert. denied, 406 U.S. 950 (1972).

146 For example, Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), aff'd, 458 F. 2d 1167 (2d Cir. 1972).

147 For example, Albemarle Paper Co. v. Moody, 422 U.S. 407 (1975).

148 See, for example: Carter v. Gallagher, op. cit., Arrington v. Mass. Bay Transp. Auth'y, 306 F. Supp. 1355 (D. Mass. 1969).

149 For example, see: DeFunis v. Odegaard, 416 U.S. 312 (1974); Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P. 2d 1152 (1976), cert. granted, 45 U.S.L.W. 3570 (Feb. 22, 1977); Lige v. Town of Montclair, 72 N.J. 5, 367 A. 2d 838 (1976).

150 Ibid.

151 The new system might take many forms; see generally: P. Tractenberg. Testing the Teacher. New York: Agathon, 1973. It might be based on a carefully validated written test. Alternatively, or in addition, it might likely involve a performance-based evaluation. As indicated previously in this paper, great interest has been sparked by a performance-based approach to teacher certification as well as to teacher training. A particular teacher certification model, advocated by the Public Education Association (PEA) of New York City and supported by many persons and organizations interested in reforming the certification process, incorporates a performance-based element; see: Public Education Association. Proposal for a Two-Step System for State Certification of Teachers and School Administrators. New York: the Association, 1971. The PEA plan is to have a provisional license available to the widest range of "high quality candidates," with that threshold standard being met by one of a variety of devices--for example, completing an approved program of preparation; receiving a certain score on the National Teacher Examination; passing any other special examination, test, or experimental evaluation program approved by the state commissioner to be hired by any school district. Once a candidate has been appointed on a provisional license, the granting of a regular license would depend upon an evaluation of the holder's performance on the job.

152 330 F. Supp. 203 (S.D.N.Y. 1971), aff'd, 458 F. 2d 1167 (2d Cir. 1972).

153 Among other things, the court had to deal with detailed questions about the adequacy of new job analyses and implementation of an interim licensing system.

154 Questions repeatedly arose about the relationship between the court-ordered interim licensing system and such other personnel policies as staff transfer and reductions in force.

155 The New York City Board of Examiners and the licensing system it has administered for eighty years has been extraordinarily resistant to substantial reform. See: P. Tractenberg. Testing the Teacher. New York: Agathon, 1973. pp. 163-67.

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